SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 549

WILLIAM D. GORDON, SECRETARY OF BANKING, ET AL., ETC., PETITIONERS,

vs.

LAURA A. WASHINGTON ET AL., ETC.

No. 550

WILLIAM D. GORDON, SECRETARY OF BANKING, ET AL., ETC., PETITIONERS,

vs.

MARY A. O'BRIEN ET AL., ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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JUDD & DETWEILER (INC), PRINTERS, WASHINGTON, D. C., JANUARY 16, 1935.

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

June Term, 1933

No. 7845

LAURA A. WASHINGTON

v.

HONORABLE WILLIAM D. GORDON, Secretary of Banking, and Robt. G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company

David Bortin, Esq., for Plaintiff;
Shippen Lewis, Esq., J. K. Willing, Esq., for Defendants;
David Bortin, Esq., for Receivers.

DOCKET ENTRIES

Aug. 25, 1933. Bill of Complaint, filed.
Aug. 25, 1933. Subpœna exit, returnable September 14, 1933.
Aug. 28, 1933. Motion for appointment of Receivers, filed.
Aug. 30, 1933. Decree appointing E. W. Wells, and Richard F. Enis Receivers of trust-fund mortgages, filed.
Aug. 31, 1933. Appearance of Shippen Lewis, Esq., for Defendants filed.
Aug. 31, 1933. Bond of Receivers, with The Ætna Casualty and Surety Company, surety, in $250,000., and Decree approving same, filed.

[fol. 2]

Sept. 1, 1933. Appearance of David Bortin, Esq., for Receivers filed.
Sept. 2, 1933. Petition for and Order of Court granting rule to show cause why certain parties should not be punished for contempt of Court, filed.
Sept. 5, 1933. Motion to dimiss Bill of Complaint, filed.

Sept. 5, 1933. Petition to vacate order appointing Receivers, filed.

Sept. 5, 1933. Supplement to petition to vacate order appointing Receivers, filed.

Sept. 5, 1933. Answer to contempt petition, filed.

Sept. 5, 1933. Subpœna returned—on August 26, served Robert G. Funkhouser, Special Deputy of Banking, etc., as to William D. Gordon, Secretary of Banking—not requested to serve, and filed.

Sept. 5, 1933. Appearance of J. K. Willing for Defendants, filed.

Sept. 5, 1933. Argued sur rule to show cause why certain parties should not be punished for contempt of Court.

Sept. 5, 1933. Testimony filed.

Sept. 22, 1933. Argued sur motion to vacate appointment of Receiver and to dismiss bill of complaint.

Sept. 22, 1933. Decree amending decree of August 30, 1933, filed.

Sept. 26, 1933. Argued sur petition to vacate appointment of Temporary Receivers.

[fol. 3]

Oct. 2, 1933. Copy of petition and rule to show cause why certain parties should not be punished for contempt of Court with return of Marshal endorsed thereon, filed.

Oct. 4, 1933. Opinion Welsh, J. denying prayer of petition to vacate appointment of Receivers, filed.

Oct. 16, 1933. Testimony filed.

Oct. 16, 1933. Petition for Appeal and Decree dismissing petition filed.

Oct. 16, 1933. Certified copy of Decree of U. S. Circuit Court of Appeals allowing appeal fixing amount of bond same to act as supersedeas filed.

Oct. 16, 1933. Præcipe for transcript of record sur appeal, filed.

Oct. 28, 1933. Decree directing that Decree dismissing petition to vacate appointment of Receiver and overruling Motion to dismiss

Bill of Complaint be entered as of October 4, 1933, filed.

Nov. 2, 1933. Stipulation as to printing record on appeal, filed.

Nov. 2. 1933. Amended præcipe for transcript of record sur appeal and acceptance of service of copy of præcipe, filed.

Nov. 27, 1933. Stipulation of counsel that all testimony shall be printed as part of record on appeal filed.

[fol. 4] In United States District Court For the Eastern District of Pennsylvania

No. 7845

[Title omitted]

Stipulation for Abbreviation of Record—Filed November 2, 1933

And now, October 31, 1933, it is stipulated by counsel for all parties that none of the record in the above case shall be printed as part of the printed record on appeal to the Circuit Court of Appeals, except the docket entries, since the record in the case of Mary A. O'Brien v. William D. Gordon, Secretary of Banking and Robert G. Funkhouser, Special Deputy as Agent, in possession of Chester County Trust Company, is to be printed in full; that the following differences between the two records in matters other than the docket entries shall be noted for the information of the Court; and that in other respects the records are, for the purposes of this appeal, to be taken as similar:

[fol. 5] 1. The plaintiff, Washington, is a citizen of Connecticut and owns a $40,000 participation certificate in a mortgage pool aggregating $2,901,236.07.

2. The receivers named in the Washington case are E. W. Wells and Richard F. Ennis.

(Sgd.) Shippen Lewis, Joseph K. Willing, Attorneys for Appellants; David Bortin, Attorney for Appellee.

[fol. 6] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, JUNE TERM 1933

No. 7849

MARY A. O'BRIEN,

v.

WILLIAM D. GORDON, Secretary of Banking, and ROBERT G. FUNKHOUSER, Special Deputy as Agent in Possession of Chester County Trust Company

David Bortin, Esq., for Plaintiff;
Shippen Lewis, Esq., J. K. Willing, Esq., for Defendants;
David Bortin, Esq., for Receivers.

DOCKET ENTRIES

Aug. 28, 1933. Bill of Complaint filed.
Aug. 28, 1933. Subpœna exit—returnable September 18, 1933.
Aug. 28, 1933. Motion for appointment of Receiver filed.
Aug. 30, 1933. Decree appointing John Hemphill, Esq., and J. Louis Breitinger, Esq., Receivers of trust fund mortgages, filed.
Aug. 31, 1933. Appearance of Shippen Lewis, Esq., for defendants filed.
Aug. 31, 1933. Bond of Receivers, with the Ætna Casualty and Surety Company, surety, in $150,000., and Decree approving bond filed.

[fol. 7]

Sept. 1, 1933. Appearance of David Bortin, Esq., for Receivers, filed.
Sept. 2, 1933. Petition for and Order of Court granting rule to show cause why certain persons should not be punished for contempt of Court filed.
Sept. 5, 1933. Motion to dismiss Bill of Complaint filed.
Sept. 5, 1933. Petition to vacate order appointing Receivers filed.
Sept. 5, 1933. Supplement to petition to vacate order appointing Receivers filed.
Sept. 5, 1933. Answer to contempt petition filed.

Sept. 5, 1933. Subpœna returned: "On August 29, served R. G. Funkhouser, Special Deputy of Banking etc.; as to Wm. D. Gordon, not requested to serve" and filed.

Sept. 5, 1933. Appearance of J. K. Willing, Esq., for defendant filed.

Sept. 5, 1933. Argued sur rule to show cause why certain parties should not be punished for contempt of court.

Sept. 22, 1933. Argued sur motions to vacate appointment of Receivers and to dismiss Bill of Complaint.

Sept. 22, 1933. Decree amending Decree of August 30, 1933 filed.

Sept. 26, 1933. Argued sur petition to vacate appointment of Temporary Receivers.

Oct. 2, 1933. Copy of petition and rule to show cause why certain parties should not be punished for contempt of Court—with return of Marshal endorsed thereon, filed.

[fol. 8]

Oct. 4, 1933. Opinion, Welsh J., denying prayer of petition to vacate appointment of Receivers filed.

Oct. 16, 1933. Testimony filed.

Oct. 16, 1933. Petition for appeal and Decree dismissing appeal filed.

Oct. 16, 1933. Certified copy of Decree of U. S. Circuit Court of Appeals allowing appeal, fixing amount of bond—same to act as supersedeas, filed.

Oct. 16, 1933. Præcipe for transcript of record sur appeal filed.

Oct. 26, 1933. Decree directing that Decree dismissing petition to vacate appointment of Receiver and overruling Motion to Dismiss Bill of Complaint be entered as of October 4, 1933, filed.

Nov. 2, 1933. Amended præcipe for transcript of record sur appeal, and acceptance of service of copy of præcipe filed.

Nov. 27, 1933. Stipulation of counsel that all testimony shall be printed as part of the record on appeal filed.

[fol. 9] In United States District Court, June Term, 1933

In Equity

No. 7849

[Title omitted]

Bill of Complaint—Filed August 28, 1933

To the Honorable, the Judges of Said Court:

The complainant on behalf of herself and all others in like interest, complains and says:

1. Your orator is a citizen of the State of New Jersey.

2. That she is the holder of a first mortgage participation certificate, issued by the Chester County Trust Company, at West Chester, Pennsylvania, in the sum of $3700.

3. That said certificate is one of a series of certificates issued by the said Chester County Trust Company to various persons and represents moneys received by the said Chester County Trust Company to be held as a trust fund [fol. 10] severed and apart from the assets of the company, in trust, for the holders of said certificates, and the said Chester County Trust Company agreed to keep the same invested only in first mortgages, secured on real estate in the State of Pennsylvania.

4. That there are outstanding certificates of the character issued as aforesaid to your complainant, in the aggregate sum of one million seven hundred forty-two thousand four hundred four dollars and ninety-one cents ($1,742,404.91).

5. Your complainant is informed, advised, believes and, therefore, avers that said moneys received by the said Chester County Trust Company from complainant and others was invested in certain mortgages located in various sections of the State of Pennsylvania and forming a mortgage pool set apart from the assets of the company as the property of complainant and others holding like certificates.

6. Complainant is unable to set forth the list of the mortgages forming such mortgage pool as the same are entirely in the possession of the defendants to which com-

plainant has no access and, therefore, has no control thereof.

7. That the Chester County Trust Company was, on the fourteenth day of February, 1933, closed by direction of the Honorable William D. Gordon, Secretary of Banking of the State of Pennsylvania by reason of the insolvent and unsafe condition of said trust company and has since continued to remain closed, and the assets of said institution are in the process of liquidation.

[fol. 11] 8. That said Honorable William D. Gordon, Secretary of Banking, by Robert G. Funkhouser, deputy in charge, is in possession of said trust company and of the mortgages forming said mortgage pool.

9. That no interest or income has been received by your complainant and others holding such certificates from the time of the closing of the said institution.

10. That since possession was taken of said trust company by the Secretary of Banking of the State of Pennsylvania, no account has been filed by him as to said mortgage pool operated by the said institution.

11. That such mortgage pool consists of many undivided interests which have been created by the said Chester County Trust Company and the said Secretary of Banking of the State of Pennsylvania, by virtue of his possession of the assets of said trust company is holding said mortgages in trust for complainant and others with like interest.

12. Complainant is informed, advised, believes, and therefore avers that interest on many of the mortgages comprising said pool has not been paid by the mortgagors or received by the Secretary of Banking or his deputy in possession and that little effort is made to secure the collection of the interest thereon.

13. That many of the bonds secured by mortgages forming said pool remain unpaid and there is danger of sales by the respective authorities by reason of the non-payment of taxes on said properties and that little effort is being made to compel the payment of taxes thereon.

14. Deponent avers that unless a receiver is appointed by your Honorable Court to take possession of all the mort-

[fol. 12] gages, assets, books and records forming said mortgage pool that the interest on said mortgages will continue in default and that taxes on many of the properties will continue to remain unpaid to the detriment and irreparable damage of complainant and others holding like certificates.

The complainant, therefore, avers that she is without remedy at law and, therefore, prays for equitable relief as follows:

(a) That a receiver or receivers be appointed to take charge of, conserve and administer all of the assets comprising the said mortgage pool.

(b) That the said receiver or receivers be authorized and empowered to take possession of all of the mortgages and of all assets, books and records of every nature forming part of said pool controlled by Honorable William D. Gordon, Secretary of Banking or his Deputy in charge of Chester County Trust Company, West Chester, Pennsylvania, and to hold, manage and operate said mortgage pool.

(c) That the receiver or receivers be authorized to demand, sue for, collect and receive, and take into their possession all of the interest due on the mortgages forming said mortgage pool; to demand the payment of taxes on properties secured by said mortgages and to institute and prosecute the suits at law or in equity for the recovery of any assets or principal mortgages.

(d) That William D. Gordon, Secretary of Banking or his deputy in charge, be directed to turn over to the receivers all mortgages comprising said pool together with an account showing the disposition of any interest received by him since he came into possession of said Chester County [fol. 13] Trust Company and the disposition of same as well as to account for the receipts and disbursements made and received in said mortgage pool from the time of its inception.

(e) That the said Honorable William D. Gordon, Secretary, furnish to said receiver or receivers, a list of all participants in said pool with their addresses and the dates and amounts received by them, the form of interest or other income, since they became participants.

(f) That the said Honorable William D. Gordon, Secretary, and his deputy in possession, be enjoined from selling, transferring or disposing of or in any manner interfering with the mortgages forming said mortgage pool or with interfering with the receiver or receivers in the performance of their duties.

(g) Such other and further relief as to your Honorable Court may seem proper and requisite.

And your petitioner will ever pray, etc.

(Sgd.) Mary A. O'Brien, David Bortin, Attorney for Complainant.

[fol. 14] *Duly sworn to by Mary A. O'Brien. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

MOTION FOR THE APPOINTMENT OF A RECEIVER—Filed August 26, 1933

And Now, this twenty-sixth day of August, 1933, comes the complainant above named by David Bortin, Esq., her attorney, and moves for the appointment of a receiver and the entry of a decree accordingly.

David Bortin, Attorney for Complainant.

[fol. 15] IN UNITED STATES DISTRICT COURT

June Term, 1933

No. 7849

[Title omitted]

[File endorsement omitted]

ORDER APPOINTING TEMPORARY RECEIVERS—Filed Aug. 30, 1933

And Now, to wit, this 30th day of August, A. D., 1933, upon consideration of the within Bill and after hearing

thereon, and upon motion of David Bortin, Esquire, Attorney for the Complainant, it is hereby

Ordered That John Hemphill and J. Louis Breitinger, be appointed Temporary Receivers of trust fund mortgages aggregating $1,742,404.91 against which Certificates were issued by the Chester County Trust Company, located at West Chester, Pennsylvania, and now in possession of William D. Gordon, Secretary of Banking of the State of Pennsylvania by Robert G. Funkhouser, his Special Deputy as Agent in Possession of Chester County Trust Company, to hold and preserve all the mortgages, property and assets, real, personal and mixed, of whatsoever kind and description including any cash on hand and belonging to and being a part of the said trust fund, and it is further

Ordered that the said Temporary Receivers be and are authorized wherever necessary to demand, sue for, collect or institute and prosecute any actions or suits in law or [fol. 16] equity for the recovery of any interest or principal of mortgages, or both, and, wherever necessary, to institute foreclosure proceedings upon default of any of the terms or provisions of said mortgages when, in the judgment or discretion of the said Temporary Receivers, such action is desirable and necessary, and to defend, compromise, adjust, intervene or become a party to any suits or actions in law or equity, as may be necessary in the judgment of the Temporary Receivers for the proper protection and maintenance of the assets of the said mortgaged trust fund and the carrying out of the terms of this decree, and likewise to defend, compromise, adjust or otherwise dispose of any and all suits, actions and proceedings that may now be pending and embracing any of the assets of the said trust fund mortgages and to take any other action or proceedings which in the judgment of the said Temporary Receivers may be advisable or proper for the protection of the assets of said trust fund mortgages, and the said William D. Gordon, Secretary of Banking of the State of Pennsylvania, and Robert G. Funkhouser, Special Deputy as Agent in possession of Chester County Trust Company, and the Chester County Trust Company and any of their agents, deputies or officers are forthwith bound, upon demand of the Temporary Receivers to turn over and deliver to them any books, papers, moneys, deeds, mortgages, bonds, property, vouchers or other assets or papers repre-

senting property under their control and belonging to the said mortgaged trust fund, and it is further

Ordered and decreed that the defendants, their servants, agents and employees are hereby enjoined from taking any action which might be hostile to or interfere with the conduct or management of the said mortgaged trust fund by the Temporary Receivers with leave, however, to any party in interest to have the order herein modified, all moneys received by the said Temporary Receivers to be deposited in a designated depository, and that they advise the Clerk of this Court in writing of the name of the depository and of the date of the opening of the account therein, and it is further

[fol. 17] Ordered that the said Temporary Receivers be, and are hereby authorized in their discretion to employ such servants, attorneys and counsel as may be in their judgment advisable or necessary in the management, conduct, control or custody of the said mortgaged trust fund, and the said Temporary Receivers be and are hereby authorized to make such payments and disbursements as may be needful or proper for the preservation of the assets of said mortgaged trust fund, and it is further

Ordered and decreed that the Temporary Receivers may enter into such agreements, employ such agents in connection with the management, care and preservation of the said mortgaged trust fund as they may deem advisable, subject to the approval of the Court in advance, and they are authorized to incur such expenses and make such disbursements as may, in their judgment, be advisable or necessary in connection with the care, preservation and maintenance of the said mortgaged trust fund, and it is further

Ordered that the Temporary Receivers within 30 days of their appointment, file with the Court a preliminary report and inventory of the assets and condition of the said mortgaged trust fund coming into their possession as Temporary Receivers, and it is further

Ordered that the said Temporary Receivers make quarterly reports to this Court as to the condition of said mortgaged trust fund and that security to be entered by the said Temporary Receivers in the sum of $150,000.00.

It is further ordered that when the amount coming into the hands of the said Temporary Receivers shall exceed the

sum of $150,000.00, that the said Temporary Receivers shall file additional security.

By the Court:

/s/ Welsh, J.

[fols. 18 & 19] IN UNITED STATES DISTRICT COURT

PETITION AND RULE TO SHOW CAUSE WHY CERTAIN PARTIES SHOULD NOT BE PUNISHED FOR CONTEMPT OF COURT—Filed September 2, 1933.

To the Honorable, the Judges of the Said Court:

The petition of John Hemphill and J. Louis Breitinger, respectfully represents:

1. That on the thirtieth day of August, A. D. 1933, your petitioners were duly appointed receivers by your Honorable Court in the above-entitled matter, and have duly qualified by entering their bond in accordance with the decree of their appointment.

2. That your Honorable Court entered a decree, directing your petitioners to take possession of all mortgages, property and assets, real, personal and mixed, of whatsoever kind and description, including any cash on hand belonging to and being a part of a trust mortgage certificate pool invested in mortgages originally by Chester County Trust Company, as Trustee, which issued participation certificates of an undivided interest in the said trust mortgage certificate pool to various persons. That the said trust mortgage certificate pool is now in the possession of William D. Gordon, Secretary of Banking of the State of Pennsylvania by Robert C. Funkhouser, his Special Deputy as Agent, having taken possession of the Chester County Trust Company's assets, in conformity with the law.

3. That the decree signed by your Honorable Court sets forth *inter alia:*

[fol. 20] "And the said William D. Gordon, Secretary of Banking of the State of Pennsylvania, and Robert C. Funkhouser, Special Deputy as Agent in possession of Chester County Trust Company, and the Chester County Trust Company, and any of their agents, deputies or officers are

forthwith bound upon demand of the receiver to turn over and deliver to them any books, papers, moneys, deeds, mortgages, bonds, property, vouchers or other assets or papers representing property under their control and belonging to the said mortgage trust fund."

A true and correct copy of the said decree is hereto attached, made part hereof and marked Exhibit "A."

4. That on the first day of September, A. D. 1933, at 3:30 o'clock P. M. (the regular Department of Banking hours), your petitioners, in pursuance of their duties as receivers, and by direction of the decree of your Honorable Court, personally called at the Chester County Trust Company in West Chester, Pennsylvania, in order to serve the said decree upon Robert C. Funkhouser, Special Deputy as Agent in Charge of the said Trust Company and to demand and to take possession of all of the mortgages, property and assets, real, personal and mixed, belonging to and being a part of the trust mortgage certificate pool directed by your Honorable Court to be turned over to your petitioners, in conformity with the order of your Honorable Court.

5. That your petitioners were informed by C. Archer Darlington, the agent of Robert C. Funkhouser, Special Deputy, that Robert C. Funkhouser was not in the bank building; that the said C. Archer Darlington did not know where the said Robert C. Funkhouser, Special Deputy, was to be found or located, and after serving the said order of [fol. 21] your Honorable Court, duly certified by the Clerk of the District Court of the United States for this district and showing that the said petitioners had qualified by entering their bond, were informed and advised by the said C. Archer Darlington that he would not turn over any of the said assets forming the said trust mortgage certificate pool without an order from Robert C. Funkhouser, Special Deputy.

6. That thereupon your petitioners demanded to see the Trust Officer and were directed by the said C. Archer Darlington to Elbert M. Pusey, Esq., a member of the Bar of West Chester, Pennsylvania, and who formerly occupied the position of Trust Officer of the said Chester County Trust Company, and who at the time petitioners called at the Chester County Trust Company, stated to your peti-

tioners that he was the agent in charge of the trust mortgage certificate pool directed to be turned over to your petitioners by decree of your Honorable Court, in the absence of Robert C. Funkhouser, Special Deputy.

7. That the said Elbert M. Pusey, Esq., after carefully reading the said decree, in the presence of your petitioners, called Howard F. Troutman, Esq., a member of the West Chester Bar and representing Robert C. Funkhouser, Special Deputy in Charge of the said Chester County Trust Company.

8. After reading the said decree to the said Howard F. Troutman, Esq., the said Elbert M. Pusey, Esq., informed petitioners that he was speaking to Howard F. Troutman, Esq., attorney for the Deputy in Charge, and that as a result of said conversation, he was authorized to and did accept service of the certified copy of decree of your Honorable Court, but refused, after demand by petitioners, to [fol. 22] surrender any of the assets forming the said trust mortgage certificate pool directed to be turned over to your petitioners, although they were in his possession and under his control and shown and exhibited to your petitioners.

9. Your petitioners aver that every reasonable effort was made by them to secure possession of the assets as directed by the decree of your Honorable Court, and that they are advised by their counsel that oral notice was given to counsel who appeared for the Banking Department on Thursday, August 30, 1933, that your petitioners would call on Friday at the offices of the Chester County Trust Company, upon Robert C. Funkhouser, Special Deputy or his agents for the surrender of the property directed by your Honorable Court to be turned over to your petitioners.

10. That the persons, to wit, Elbert M. Pusey, Esq., and C. Archer Darlington, who are the agents and representatives of Robert C. Funkhouser, Special Deputy in Charge of the Chester County Trust Company in the absence of Robert C. Funkhouser, were in actual charge of the property directed by your Honorable Court to be turned over and surrendered to your petitioners, but notwithstanding the fact that they had possession and control thereof, in violation of the said order and in contravention and in de-

fiance of the laws of the United States, they refused to abide by the said order and decree and still refuse to turn over any of the books, records, papers, bonds, mortgages, deeds, moneys, or other assets comprising the said trust mortgage certificate pool.

Wherefore your petitioners pray for a rule to issue against Robert C. Funkhouser and his agents, Elbert M. Pusey, Esq., and C. Archer Darlington, to show cause why [fol. 23] they and each of them should not be adjudged in contempt of the order and decree of your Honorable Court.

And your petitioners will ever pray, etc.

(Sgd.) David Borton, Solicitor for Petitioner.

Duly sworn to by J. Louis Breitinger. Jurat omitted in printing.

[fol. 24] RULE

Before Welsh, J.

And Now, to wit, this second day of September, A. D. 1933, upon consideration of the foregoing petition, and on motion of David Bortin, Esq., and Hirschwald, Goff and Rubin, Esqs., attorneys for petitioners, a rule is hereby entered on Robert C. Funkhouser, and his agents, Elbert M. Pusey, Esq., and C. Archer Darlington, to show cause why they should not be adjudged guilty of contempt of court for failure to comply with the decree of this Court.

Rule returnable the fifth day of September, A. D. 1933, at 10 o'clock A. M. in Room 310.

By the Court:

Attest: Leo A. Lilly, Deputy Clerk.

[fol. 25] EXHIBIT "A" TO PETITION

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF PENNSYLVANIA—JUNE TERM, 1933

In Equity

No. 7849

MARY O'BRIEN, Complainant

vs.

WILLIAM D. GORDON, Secretary of Banking, and ROBERT G. FUNKHOUSER, Special Deputy as Agent in Possession of Chester County Trust Company, Defendants

Order

And now, to wit, this 30th day of August, A. D. 1933, upon consideration of the within Bill and after hearing thereon and upon motion of David Bortin, Esquire, Attorney for the Complainant, it is hereby

Ordered that John Hemphill and J. Louis Breitinger, be appointed Receivers of trust fund mortgages aggregating $1,742,404.91 against which Certificates were issued by the Chester County Trust Company, located at West Chester, Pennsylvania, and now in possession of William D. Gordon, Secretary of Banking, of the State of Pennsylvania, by Robert G. Funkhouser, his Special Deputy as Agent in Possession of Chester County Trust Company, to hold and [fol. 26] preserve all the mortgages, property and assets, real, personal and mixed, of whatsoever kind and description including any cash on hand and belonging to and being a part of the said trust fund, and it is further

Ordered that the said Receivers be and authorized wherever necessary to demand, sue for, collect or institute and prosecute any actions or suits in law or equity for the recovery of any interest or principal of mortgages, or both, and, wherever necessary, to institute foreclosure proceedings upon default of any of the terms or provisions of said mortgages when, in the judgment or discretion of the said Receivers, such action is desirable and necessary, and to defend, compromise, adjust, intervene or become a party to any suits or actions in law or equity, as may be necessary in the judgment of the Receivers for the proper pro-

tection and maintenance of the assets of the said mortgaged trust fund and the carrying out of the terms of this decree, and likewise to defend, compromise, adjust or otherwise dispose of any and all suits, actions and proceedings that may now be pending and embracing any of the assets of the said trust fund mortgages and to take any other action or proceedings which in the judgment of the said Receivers may be advisable or proper for the protection of the assets of said trust fund mortgages, and the said William D. Gordon, Secretary of Banking of the State of Pennsylvania, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company, and the Chester County Trust Company and any of their agents, deputies or officers are forthwith bound, upon demand of the Receivers to turn over and deliver to them any books, papers, moneys, deeds, mortgages, bonds, property, vouchers or other assets or papers representing property under their control and belonging to the said mortgaged trust fund, and it is further

[fol. 27] Ordered and Decreed that the defendants, their servants, agents and employees are hereby enjoined from taking any action which might be hostile to or interfere with the conduct or management of the said mortgaged trust fund by the Receivers with leave, however, to any party in interest to have the order herein modified, all moneys received by the said Receivers to be deposited in a designated depository, and that they advise the Clerk of this Court in writing of the name of the depository and of the date of the opening of the account therein, and it is further

Ordered that the said Receivers be, and are hereby authorized in their discretion to employ such servants, attorneys, and counsel as may be in their judgment advisable or necessary in the management, conduct, control or custody of the said mortgaged trust fund, and the said Receivers be and are hereby authorized to make such payments and disbursements as may be needful or proper for the preservation of the assets of said mortgaged trust fund, and it is further

Ordered and Decreed that the Receivers may enter into such agreements, employ such agents in connection with the management, care and preservation of the said mort-

gaged trust fund as they may deem advisable, subject to the approval of the Court in advance, and they are authorized to incur such expenses and make such disbursements as may, in their judgment, be advisable or necessary in connection with the care, preservation and maintenance of the said mortgaged trust fund, and it is further

Ordered that the Receivers within 30 days of their appointment, file with the Court a preliminary report and inventory of the assets and condition of the said mortgaged trust fund coming into their possession as Receivers, and it is further

[fol. 28] Ordered that the said Receivers make quarterly reports to this Court as to the condition of said mortgaged trust fund and that security to be entered by the said Receivers in the sum of $150,000.00.

It is further ordered that when the amount coming into the hands of the said Receivers shall exceed the sum of $150,000.00, that the said Receivers shall file additional security.

By the Court:

/s/ Welsh, J.

[fol. 29] IN UNITED STATES DISTRICT COURT

ANSWER TO CONTEMPT PETITION—Filed September 5, 1933

Robert G. Funkhouser, Elbert N. Pusey and C. Archer Darlington, answer as follows to the petition for a rule to show cause why they should not be adjudged in contempt:

1. The respondents deny that the petitioners were duly appointed receivers in this matter and aver, on the advice of counsel, that the order appointing them receivers is void.

2. Admitted, except that the respondents aver, on the advice of counsel, that the decree appointing receivers is void.

3. The respondents have not seen the original decree signed by the court but believe the quotation in the petition to be correct since the attorney for the petitioners so certifies.

4. Admitted.

5. Admitted.

6. Denied. Elbert N. Pusey informed the petitioners that he was not in charge of the mortgage pool, that he had nothing to do with it, and that he could deliver no assets or records without orders from his superior, Robert G. Funkhouser, who was then absent.

7. Admitted.

8. It is admitted that Elbert N. Pusey permitted the petitioners to leave with him what purported to be copies of an order of this court appointing receivers. It is also admitted that Elbert N. Pusey refused to surrender to the petitioners [fol. 30] any of the assets of the mortgage pool. It is denied that such assets were in the possession and under the control of Elbert N. Pusey.

9. It is denied that every reasonable effort was made by the petitioners to secure possession of the assets. It is denied that any notice, oral or written, was given to any of your petitioners or to counsel who appeared for the Banking Department, of an intention to make a demand on September 1, as above described. The petitioners appeared without notice, in the absence of the deputy receiver, at 3:30 P. M. on the Friday before Labor Day.

10. It is denied that Elbert N. Pusey and C. Archer Darlington were in actual charge of the assets of the mortgage pool and it is denied that they had possession and control thereof. It is admitted that they refused to turn over any of the records or assets.

For further answer the respondents say:

11. The respondent, Robert G. Funkhouser, deputy receiver, was absent from the trust company building when the petitioners arrived, accompanied by two other persons claiming to be receivers of another mortgage pool, and accompanied by counsel. The respondents, Pusey and Darlington, are subordinates of the respondent, Funkhouser, and have no authority to deliver any paper or asset to anyone without orders from Funkhouser. When Funkhouser returned to the trust company building on September 1, 1933, and found for the first time that the alleged receivers had demanded possession of the assets, the business day was nearly over. On the very next day, being Saturday before Labor Day, a Deputy United States Marshal served,

at about noon, copies of the petition to which this answer is [fol. 31] made. No notice of an intention to take this step was given to any of your petitioners or to their counsel.

12. The respondents aver, on the advice of counsel, that the order appointing receivers is void; that the assets and records of the mortgage pool are entirely safe in the possession of the Secretary of Banking and of the deputy receiver as they have been since the Chester County Trust Company closed on February 14, 1933; that there is no occasion for haste; and that they cannot turn over the said assets and records to anyone without an order from the Court of Common Pleas of Chester County, which court alone has jurisdiction with respect to this matter.

13. The respondents are advised by counsel for the Department of Banking, and therefore aver, that on September 5, 1933, the defendants in this cause will present to the Court a motion to dismiss the bill for want of equity and a petition to vacate the order appointing receivers.

14. On September 4, 1933, upon bill of complaint filed with Court of Common Pleas of Chester County by a mortgage pool certificate holder, that Court ordered an injunction to issue restraining your petitioners from delivering any assets or records of the said mortgage pool to any persons appointed receivers by the United States District Court, pending further order from the Court of Common Pleas of Chester County. This injunction was issued and service thereof has been effected. A copy of the injunction is attached hereto, marked Exhibit "A."

Robert G. Funkhouser, Elbert N. Pusey, C. Archer Darlington.

[fol. 32] EXHIBIT "A" TO ANSWER

IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY

Equity No. 858

NATIONAL BANK OF CHESTER COUNTY AND TRUST COMPANY, Substituted Guardian in Place of Chester County Trust Company, Guardian of the Estate of John B. McCreery, a Minor,

v.

WILLIAM D. GORDON, Secretary of Banking, of the Commonmonwealth of Pennsylvania, Receiver of Chester County Trust Company, and ROBERT G. FUNKHOUSER, Deputy Receiver of Chester County Trust Company.

Decree

And Now, September 4, 1933, the foregoing Bill having been presented and considered, it is ordered and adjudged that a preliminary injunction shall issue enjoining and restraining William D. Gordon, Secretary of Banking of the Commonweath of Pennsylvania, Receiver of the Chester County Trust Company, Robert G. Funkhouser, Deputy Receiver of said company, and all other persons in their employ from delivering to any or all persons appointed receiver by the United States District Court of the Eastern District of Pennsylvania, all mortgages, securities, books, papers, records and all other matters pertaining to the first mortgage participation certificate pool until hearing shall be had on this bill, which is hereby set for the 8th day of September, 1933 at 9 A. M. and thereafter to abide further order by the Court.

W. Butler Windle, J.

[fol. 33] *Duly sworn to by R. G. Funkhouser. Jurat omitted in printing.*

[fol. 34] IN UNITED STATES DISTRICT COURT

Statement of Evidence

Testimony—Hearing, September 5, 1933

Philadelphia, Pa., Tuesday, Sept. 5, 1933

Before Hon. George A. Welsh, J.

Present: David Bortin, Esq., and Hirschwald, Goff & Rubin, by David Goff, and Alexander N. Rubin, Esqs., for the complainant; William A. Schnader, Attorney General of the Commonwealth of Pennsylvania; Shippen Lewis, Esq., Special Deputy Attorney General, and Joseph K. Willing, for the Defendants.

Mr. Bortin: This is a hearing upon the petition of Edward W. Wells and Richard F. Ennis, Receivers, for a rule to issue against Robert C. Funkhouser and his agents, Albert M. Pusey, Esq., and C. Archer Darlington, to show cause why they, and each of them, should not be adjudged in contempt of the order and decree of your Honorable Court.

Evidence on Behalf of the Petitioners

JOHN HEMPHILL, having been duly sworn, was examined and testified as follows:

By Mr. Bortin:

Q. You are one of the receivers appointed by this Court in the matter of Laura A. Washington against Hon. William D. Gordon and others?

A. Yes, sir.

[fol. 35] Q. Tell the court what happened when you went with the order of the Court to the Chester County Trust Company, to serve the order of the Court, and to take possession of the assets.

A. We went last Friday, at about three o'clock in the afternoon, or a little after three. The party then consisted of yourself and Mr. Goff, attorneys, Mr. Wells, Mr. Ennis, Mr. Breitinger and myself, the four receivers.

Q. Tell the Court what took place.

A. We went into the building, and there we met, the first person who appeared was Mr. Darlington, whom I knew and spoke to, and Mr. Ennis likewise knew him, and to whom we introduced the others of the parties, and we asked him where Mr. Funkhouser was, and he said that Mr. Funkhouser was out, and he did not know just when he would return.

Q. What did you do then?

A. We then talked for a while to Mr. Darlington, and showed him the certified copy of the decree, that is, as I recall it, Mr. Bortin handed it to him. He did not know exactly what to do about it, and while the discussion was on I left with Mr. Ennis to call Mr. Troutman, attorney for the Commissioner of Banking, and when I got back with Mr. Ennis, I found the rest of the parties in the office with Mr. Pusey, of the bank——

By the Court:

Q. Who is Mr. Pusey?

A. I don't know whether Mr. Pusey was the trust officer or the assistant trust officer of the Chester County Trust Company; but he remained in the employ, and he now remains there in the employ of the Commissioner of Banking. Mr. Pusey had in his hand, and was reading at the time, the certified copy of the decree of the Court.

[fol. 36] By Mr. Bortin:

Q. That was in your presence?

A. Yes, sir, when I came in he had it in his hand and was reading it. Mr. Pusey, like Mr. Darlington, did not seem to know exactly what to do. A telephone call was made to Mr. Troutman, only one side of which I heard, and it did not seem to result in anything definite.

By the Court:

Q. Was that an incoming or an outgoing call?

A. I think Mr. Pusey put that call into Mr. Troutman. Then there was some further discussion, and there was an incoming telephone call which came in, at which time Mr. Pusey was apparently talking to a Deputy Commissioner of Banking, whose name I have forgotten, Mr. Shelmire, or something of that kind.

By Mr. Bortin:

Q. Was it Skidmore?

A. Skidmore, yes, sir; and I heard Mr. Pusey speaking over the phone, as if repeating instructions given to him from the other end, that he could accept service, but that he did not have the right to turn over anything to the receivers, pursuant to the Court's decree. That substantially closed the episode, and we left after we had examined the thing in detail, and had noted the actual existence in the safe of a great many files and folders which Mr. Pusey said contained the mortgages in question.

Cross-examination.

By Mr. Willing:

Q. Do you reside in West Chester, is that correct?

A. Yes, sir.

Q. On the day when you went out with the other gentlemen whom you have mentioned to serve this decree, had you [fol. 37] given notice to Mr. Funkhouser before you went?

A. No, Mr. Willing, I had not done so myself, and I did not know until the day before that we were going, and I was told to be at Mr. Bortin's office at two o'clock. I asked Mr. Bortin whether you, Mr. Willing, had received notice, and he said, yes.

Q. And you did not know as a matter of fact whether I had been on notice, or was not on notice?

A. I do not know, no, sir.

Q. Who is the deputy receiver of the Chester Trust Company?

A. Mr. Funkhouser is a deputy commissioner in charge, is that what you mean?

Q. The act calls him deputy receiver, and I used that terminology. Mr. Funkhouser and Mr. Pusey and Mr. Darlington were there, and Mr. Pusey and Mr. Darlington are simply employees at the bank, is that correct?

A. To the best of my knowledge.

Q. You did not see Mr. Funkhouser, did you?

A. No, I did not.

Q. And Mr. Funkhouser, as far as you know, did not know that you were coming with the Court decree, is that correct?

A. That is correct.

Re-direct examination.

By Mr. Bortin:

Q. Did Mr. Pusey say that he was in charge and had the control of all of those papers comprising this mortgage pool, and did he show you where they were located?

A. I don't recall, Mr. Bortin, that specific statement. He said that he was in control of their possession, and he took us to the safe; that was to see they were there.

[fol. 38] Q. And you saw him reading the order of the Court?

A. Yes, sir; he read it over, and in addition to that he read it over the telephone to this Deputy Commissioner of Banking. I read to him two or three paragraphs that contained the mandate of this Court to all employees of the Commissioner of Banking, to turn over these papers.

By the Court:

Q. What is the name of that Deputy Commissioner?
A. It has slipped my mind, temporarily; but I heard it a moment ago.

By Mr. Bortin:

Q. Was it Mr. Skidmore?
A. Skidmore, that was the name.

By the Court:

Q. Is he here this morning?
A. I don't know.
Q. Is Mr. Funkhouser here?
A. Yes, sir.
Q. Where is Skidmore?

Mr. Bortin: Skidmore was not in the bank at all.

By the Court:

Q. Was this over the telephone?
A. That was over the telephone to Mr. Pusey.

The Court: Will you get him here this morning?
Mr. Willing: Yes, sir.

[fol. 39] Recross-Examination.

By Mr. Willing:

Q. What time did you get there?

A. It must have been very close to 3 o'clock, perhaps a few minutes after.

Q. What time did you leave?

A. We met at Mr. Bortin's office at 2:10; I did not look at my watch; I am only just estimating the driving time, but I believe it was 3 o'clock, or it could not have been more than ten minutes after 3.

Q. What time did you leave, do you know?

A. I think we left a little after 4.

Edward W. Wells, having been duly sworn, was examined and testified as follows:

By Mr. Bortin:

Q. You are one of the receivers appointed by the United States Court in the matter of Laura A. Washington against William D. Gordon, Secretary of Banking, et al.?

A. Yes, sir.

Q. Tell the Court when you called upon those in charge of the Chester County Trust Company, to take over the assets ordered to be taken over by the Court.

A. I can add very little to what Mr. Hemphill has already testified to. We met at Mr. Bortin's office at 2 o'clock, and we left there a few minutes after 2; we proceeded to West Chester by automobile, and went to the banking institution. We walked in and there we met the man by the name, I think, of Mr. Donaldson, I am not sure of that name; it is the gentleman over there——

Q. Mr. Darlington?

[fol. 40] A. Yes, sir, Mr. Darlington. We met Mr. Darlington and asked him if Mr. Funkhouser was in. He said Mr. Funkhouser was not in. We asked him when he would be in and he said he did not know. We asked him whether he had received notice of our coming, and he said he had not received notice himself, and he did not know about the rest. We talked around with him for quite a while, and Mr. Hemphill went out, I think to see one of the counsel. While he was out we talked with Mr. Pusey and with Mr.

Darlington, and finally we asked him where the Trust Department was, and whether it was open, something to that effect, and he said it was in the rear. There were not many persons there in that part of the institution. I think there were two ladies there in the institution, it was rather empty and bare. We walked around to the Trust Department and there we found Mr. Pusey and a number of clerks and some other gentlemen in the Trust Department. We previously had read to Mr. Darlington the decree and order of the Court, and we read the special clause in the decree which applied to all employees there, as well as naming Mr. Funkhouser, and someone else. We called his attention to that fact. We told him of the order and told him that we were receivers under the mandate of the Court, and that he was responsible under that decree and mandate. He said he had no authority to do anything.

By the Court:

Q. Did he give you that as an answer?

A. Simply, I think, that he was not really the man in charge. Of course, I can understand his position. He did not think he could take any specific action in the absence of Mr. Funkhouser. We talked this over with Mr. Pusey and showed him the copy of the decree, and called his attention to the clause I have mentioned on the second page there, with regard to the duty of all employees as well as [fol. 41] of Mr. Funkhouser to comply with the mandate of the Court; and Mr. Pusey was apparently in the same position as Mr. Darlington. He asked whether he might confer with counsel, and we said of course, so he called up counsel, I believe; that is my impression, but I was not sure; I am not sure whether it was that conversation that came in over the telephone. Then he said, "I am directed not to turn the records and papers over to you."

Mr. Willing: I object to any telephone conversation here, as being hearsay testimony.

The Witness: I am not testifying except as to what Mr. Pusey told me. Mr. Pusey turned to us and said this. He said, "I am directed not to turn any of the records, etc., and the books, over to you." There was something about a question of the jurisdiction of the Court.

By the Court:

Q. He questioned the jurisdiction of the Court?

A. Yes, sir. We then asked him whether he had the mortgage papers and the other records there in the office, and he said he had. We asked him whether he would show them to us, and he took us into the vault, and we saw there the drawers and files, which he opened, and showed us a large collection of papers and he said, they are the mortgage papers, with the exception of a few scattered around. I think that was all, except that we asked him for them and he refused to give them to us.

By Mr. Bortin:

Q. You are sure that the entire decree was read to him?

A. Oh, yes; at least that is my impression, that he read the entire decree. I, myself, called his attention to that part of which I have spoken, referring to the employees.

[fol. 42] Q. You made demand for the assets comprised in that decree?

A. Absolutely.

Q. And Mr. Pusey showed you where they were located?

A. Yes, sir.

Q. And refused to turn them over?

A. Yes, sir.

Cross-examination.

By Mr. Willing:

Q. Did you give anyone notice as to the time you were going to go to the bank to take possession of the assets?

A. No, I did not.

Q. Do you of your own knowledge know whether Mr. Funkhouser knew you were coming?

A. No, I do not.

Q. What time did you arrive at the bank?

A. With all the rest of them, it was shortly after 3 o'clock. We left Mr. Bortin's office shortly after 2. I heard Mr. Hemphill say it would be about an hour's drive, approximately.

Q. How long were you at the bank?

A. I should say about an hour, probably a little longer.

Q. Then you left?
A. Yes, sir.

(Conference at side-bar, not reported.)

The Court thereupon adjourned until 10 o'clock A. M. Wednesday, September 6, 1933.

[fol. 43] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS BILL IN EQUITY—Filed September 5, 1933

And now, September 5, 1933, come the defendants, by their solicitors, Joseph K. Willing and Shippen Lewis, and move the Court to vacate and set aside the order entered on August 30, 1933, appointing receivers, and to dismiss the bill of complaint for want of equity, for the following reasons:

1. From the face of the bill and from the laws of Pennsylvania it appears that the defendant, William D. Gordon, is in possession of the business and property of the Chester County Trust Company by virtue of the laws of Pennsylvania and that he has, with respect to those assets, all the powers and duties of a general receiver appointed by any Court of Equity in Pennsylvania, except as such rights, powers and duties are increased or limited by the provisions of the Department of Banking Code which became effective on July 5, 1933.

2. From the face of the bill and from the laws of Pennsylvania it appears that the defendant, William D. Gordon, as Secretary of Banking, in possession of the Chester County Trust Company, is "responsible to the Court in which the Certificate of Possession is filed and not to any other Court."

3. From the face of the bill and from the laws of Pennsylvania it appears that the Court of Common Pleas of Chester County have already assumed jurisdiction of the defendants, William D. Gordon and Robert G. Funkhouser, in their respective capacities of receiver and deputy re-
[fol. 44] ceiver of Chester County Trust Company.

4. From the face of the bill and from the laws of Pennsylvania it appears that the defendants are bound to file an account as to the said mortgage pool with the Court of Common Pleas of Chester County, and to deliver the assets of the pool only to a substituted fiduciary appointed by that Court, unless all the owners of undivided interests in the said pool agree upon the delivery of those assets to a person designated by them.

5. It does not appear in the bill that the Court of Common Pleas in Chester County or the owners of all undivided interests in the pool have authorized the defendants to deliver any assets or records of the said mortgage pool to any one.

6. From the face of the bill it does not appear that the complainant has made any effort to procure the appointment by the Court of Common Pleas of Chester County, of a substituted fiduciary of the said mortgage pool, as provided by the laws of Pennsylvania.

7. The bill does not state any facts to show that any damage has been done or will be done to any party in interest if receivers are not appointed.

8. The complainant has an adequate remedy by application to the Court of Common Pleas of Chester County for the appointment of a substituted fiduciary of the said mortgage pool.

9. The District Court of the United States has no authority to appoint, under the title of receivers, persons who are in fact intended to act as substituted fiduciaries of the said mortgage pool.

[fol. 45] 10. The United States District Court has no authority to interfere with the Commonwealth of Pennsylvania in the exercise of the Commonwealth's powers.

Joseph K. Willing, Attorney for the Department of Banking of the Commonwealth of Pennsylvania; Shippen Lewis, Special Deputy Attorney General of the Commonwealth of Pennsylvania, Solicitors for Defendants.

[fol. 46] IN UNITED STATES DISTRICT COURT

PETITION TO VACATE ORDERS APPOINTING RECEIVERS—Filed September 5, 1933

To the Honorable, the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

The petition of William D. Gordon and of Robert G. Funkhouser respectfully represents:

1. Your petitioner, William D. Gordon, is, and has been since before February 14, 1933, the Secretary of Banking of the Commonwealth of Pennsylvania, and by virtue of the powers and duties conferred upon him by the laws of Pennsylvania took possession on February 14, 1933, of the business and property of Chester County Trust Company, a corporation having its place of business in the Borough of West Chester in Chester County, Pennsylvania.

2. Immediately upon taking possession, William D. Gordon filed a certified copy of his certificate of possession with the Prothonotary of the Court of Common Pleas of Chester County, who docketed and indexed it as of —— Term, 193-, No. —, as required by the laws of Pennsylvania.

3. The Department of Banking Code, a statute of Pennsylvania which became effective on July 3, 1933, provides in Section 701 as follows:

"Except as otherwise provided in this Act, the Secretary, when he has taken possession of the business and property of an institution, shall be responsible to the court in which the certificate of possession is filed, and not to any other [fol. 47] court. His rights, powers and duties shall be those of a general receiver appointed by any court of equity in this Commonwealth, except as such rights, powers and duties are increased or limited by the provisions of this act."

4. Your petitioner, Robert G. Funkhouser, is the deputy receiver of Chester County Trust Company, duly appointed by the Secretary of Banking in accordance with the laws of Pennsylvania.

5. Chester County Trust Company operated a mortgage trust fund or mortgage pool known as the first mortgage

certificate pool against which there had been issued to various participants certificates which, at the closing of the trust company, aggregated $1,741,770 (including a small interest held by the trust company).

6. Since the closing of the trust company your petitioners have continued to operate the said mortgage pool and are ready at any time to file with the Court of Common Pleas of Chester County an account as to the assets comprising the pool and as to the management thereof, all in accordance with the requirements of the laws of Pennsylvania.

7. The Department of Banking Code of Pennsylvania further provides that after the Secretary of Banking has taken possession of an institution, the owner of any undivided interest in a mortgage pool may file, in the court in which the certificate of possession has been filed, a petition for the appointment of a substituted fiduciary for such mortgage pool. In every case in Pennsylvania in the past three years in which possession of a mortgage pool has been transferred from the Secretary of Banking, the transfer has been effected in accordance with the laws of Penn- [fol. 48] sylvania and in pursuance of the appointment of a substituted fiduciary by the appropriate court of common pleas.

8. No petition for the appointment of the substituted fiduciary of the said mortgage pool has yet been filed with the Court of Common Pleas of Chester County; but your petitioners are informed, believe and therefore aver that such a petition will shortly be filed by certain owners of undivided interests in the pool.

9. On August 28, 1933, a bill in equity against your petitioners was filed with your Honorable Court by the complainant in this case, averring that she owns an undivided interest in the said pool of $3700, or .2 per cent thereof, and that your petitioners are not conducting the said mortgage pool in the best interests of the participants, and praying for the appointment of a receiver or receivers of the said pool. The said complainant avers that she is a resident of New Jersey.

10. In pursuance of this bill in equity your Honorable Court issued a subpœna on August 28, 1933, commanding your petitioners to appear within twenty days after the

service thereof to answer the said bill. This subpœna was served on your petitioner, Robert G. Funkhouser, on August 29, 1933.

11. Your petitioners are informed, believe and therefore aver that no notice of the said bill in equity has been given to any other participant in the said mortgage pool, except as such participants have learned of the proceedings from conversation and from common report in and about West Chester.

12. On August 30, 1933, there being still nineteen days in which to appear and to answer the said bill, an unknown person, who refused to give his name, telephoned to your [fol. 49] petitioner, Robert G. Funkhouser, saying that he was speaking from the office of the clerk of your Honorable Court, that the said bill in equity had been called for a hearing that morning and that the hearing had been continued until 2 P. M. so that an attorney for the Department of Banking could appear.

This telephone message came at 12:40 P. M.

13. At the hearing at 2 P. M. your petitioners were represented by counsel for the Department of Banking, who had had no opportunity to examine the adjudicated cases or satisfactorily to prepare his case.

14. Counsel acting for the Department of Banking, asked for further time to consider the matter and for an opportunity to submit a brief. His Honor, Judge Welsh, who was sitting alone, said that a brief was unnecessary and that he would take the matter under advisement.

15. In less than an hour after the conclusion of the hearing his Honor, Judge Welsh, signed an order appointing

John Hemphill and J. Louis Breitinger,

receivers of the said mortgage pool.

16. Two days later, on September 1, 1933, without previous notice to the Department of Banking or to its counsel, the persons so named as receivers appeared in person, accompanied by their counsel, at the Chester County Trust Company, and demanded of C. Archer Darlington and of Elbert N. Pusey, subordinates of your petitioner, Robert G. Funkhouse, the deputy receiver, that they deliver to

them all the assets and records of the said mortgage pool. This, Mr. Darlington and Mr. Pusey refused to do without orders from your petitioner, Robert G. Funkhouser, who [fol. 50] was then absent. Mr. Pusey then accepted service of copies of the order naming the persons who claimed to be receivers, and these persons then left. Neither Mr. Pusey nor Mr. Darlington had authority to deliver any records or assets of the mortgage pool without orders from their superior, the deputy receiver. The demand above described was made at or about 3:30 P. M.

17. At or about noon of the next day, September 2, 1933, being the Saturday before Labor Day, a Deputy United States Marshal came to the Chester County Trust Company with copies of a rule issued that day on your petitioner, Robert G. Funkhouser, and on his assistants, C. Archer Darlington and Elbert N. Pusey, directing them to appear before your Honorable Court on September 5, 1933, at 10 A. M. to show cause why they should not be adjudged guilty of contempt of court. The Deputy Marshal being unable to serve these rules on all three of the persons named, service was accepted in their behalf by the representative of the Department of Justice assigned to Chester County Trust Company.

18. The persons named as receivers in the said decree are not persons chosen by the participants in the said mortgage pool, except the complainant in the bill of equity who has only a very small fractional interest in the said pool. All of the mortgages in the pool are on real estate in the counties of Chester, Delaware and Montgomery, so that it is peculiarly appropriate that the certificate-holders, who are principally Chester County people, should suggest to the Court of Common Pleas of Chester County in accordance with the laws of Pennsylvania a man of their own choice as substituted fiduciary.

19. Your petitioners have conducted the said mortgage pool with the utmost regard for the interests of the partici- [fol. 51] pants, since February 14, 1933, and no damage can occur to any party in interest if the further conduct of the pool proceeds in an orderly manner as provided by the laws of Pennsylvania.

Wherefore, your petitioners pray that the said order appointing receivers should be vacated and set aside.

And your petitioners further pray that this petition to vacate the order appointing receivers and the motion to dismiss the bill of complaint shall be heard by all three of the judges of your Honorable Court sitting in banc.

And your petitioners further pray that pending the determination of the said motion and of the said petition, your Honorable Court will order all proceedings, under the said order appointing receivers, to stay.

And your petitioners will ever pray, etc.

Joseph K. Willing, Attorney for the Department of Banking of the Commonwealth of Pennsylvania; Shippen Lewis, Special Deputy Attorney General of the Commonwealth of Pennsylvania, Solicitors for Petitioners.

[fol. 52] *Duly sworn to by Robert G. Funkhouser. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

SUPPLEMENT TO PETITION TO VACATE ORDER APPOINTING RECEIVERS—Filed September 5, 1933

To the Honorable, the Judges of the District Court of the United States, for the Eastern District of Pennsylvania:

As a supplement to their petition to vacate an order appointing receivers, William D. Gordon and Robert G. Funkhouser respectfully represent:

That on September 4, 1933, upon bill of complaint filed with the Court of Common Pleas of Chester County by a mortgage pool certificate holder, that Court ordered an injunction to issue restraining your petitioners from delivering any assets or records of the said mortgage pool to any persons appointed receivers by the United States District Court, pending further order from the Court of Common [fol. 53] Pleas of Chester County. This injunction was issued and service thereof has been effected. A copy of the injunction is attached hereto, marked Exhibit "A."

Joseph K. Willing, Attorney for the Department of Banking of the Commonwealth of Pennsylvania; Shippen Lewis, Special Deputy Attorney General of the Commonwealth of Pennsylvania, Attorneys for Defendants.

Duly sworn to by Robert G. Funkhouser. Jurat omitted in printing.

[fol. 54] EXHIBIT "A" TO SUPPLEMENT TO PETITION TO VACATE, ETC.

[Omitted. Printed side page 32 ante.]

[fol. 55] IN UNITED STATES DISTRICT COURT

ORDER AMENDING ORDER APPOINTING RECEIVERS—Filed September 22, 1933

And now, to wit, this twenty-second day of September, A. D. 1933, it appearing to the Court that its order entered on the thirtieth day of August, A. D. 1933, in the above matter wherein John Hemphill and J. Louis Breitinger were appointed receivers, failed to set forth that the appointment of such receivers was temporary until hearing on bill and answer, although such temporary appointment was intended, it is

Ordered and decreed that the said order be and it is hereby amended so that John Hemphill and J. Louis Breitinger shall only have the rights, duties and privileges of temporary receivers in the above matter until hearing on bill and answer or other disposition of the cause, and that wherever the word receiver or receivers appear that the word "temporary" shall precede it.

By the Court:

Welsh, J.

[fol. 56] IN UNITED STATES DISTRICT COURT

ARGUMENT—Hearing September 26, 1933

Philadelphia, Pa., Tuesday, Sept. 26, 1933

Before Hon. George A. Welsh, J.

Present: David Bortin, Esq., for the complainants; William A. Schnader, Esq., Attorney General of the Commonwealth of Pennsylvania, Shippen Lewis, Esq., Special Deputy Attorney General, and Joseph K. Willing, Esq., for the defendants.

Mr. Bortin: Your Honor fixed the hearing to give any parties in and around West Chester an opportunity to come in and be heard in connection with this proceeding. I understand yesterday your Honor fixed a hearing for today, it having been fixed for yesterday. We have other members of the Bar of the West Chester court. I don't know whether any of them are here today. The matter was postponed yesterday until today. I don't know just what your Honor should do.

The Court: Is there anybody here from Chester County, or anybody representing any interests in this case that would like to be heard?

(No response.)

Mr. Willing: I might say to your Honor that Colonel Holden was here yesterday, but he left the court yesterday and he said he wouldn't enter an appearance in this procedure because he didn't think technically that would be the right thing to do, but if your Honor would have given [fol. 57] him an opportunity he would state, and he has authorized me to state that he represents very close to two million dollars worth of participating certificates in these pools, and that he was opposed to appointing receivers and taking jurisdiction away from the Secretary of Banking; that on behalf of the two million dollars worth of participating certificates he represents, he would state to the Court that he thought that the matter was being very well handled as is being done by the Secretary of Banking.

The Court: I am going to ask that that be put down on the notes of testimony, but I regret that the colonel is not here. He has not entered his appearance so that his status could be officially before me and counsel who represents the complainants would have an opportunity to find out exactly what the position of Colonel Holden might be, perhaps a little bit more in detail, but I am going to ask that that statement be put on the notes of testimony and be made a part of the record.

Mr. Bortin: May I ask Mr. Willing whether the colonel did not anticipate the filing of a petition for the appointment of a substituted fiduciary in this matter?

Mr. Willing: I am not here for cross-examination, I am making a statement to the Court that the colonel requested me to make.

Mr. Bortin: I am going to ask that such a statement be stricken from the record because it is not relevant to the subject in discussion now, because I would have liked to ask Colonel Holden a few questions myself.

The Court: So would the Court. I will not strike it from the record. I appreciate Mr. Willing's bringing it here as an officer of the court at the request of another member of [fol. 58] the Bar, and I will have it spread on the record; but I am, as I say, sorry that I could not have heard it in more detail.

Mr. Willing: He just requested me to make that statement.

The Court: There are many technicalities that I wanted to get in a little bit more detail.

Mr. Willing: I don't even request that this be put on the record. I have no objection to it being in the record, I am merely delivering a message from one member of the Bar to the Court.

The Court: I am putting it on the record to show that you discharged your duty to your friend so that the colonel can see for himself, if he wishes.

I believe we had practically finished the arguments on both sides, and I continued the case until today in order that there might be some expression from persons who might still want to be heard. Is there anybody else?

Mr. Bortin: I have not concluded my argument, but I think I had argued sufficiently at the time, but my brief covers all the other points I did not cover in my argument.

The Court: Is there any important part of your brief that you will like to argue orally? I am going to read your brief, but I assure you the Court does not like to hear any more argument.

Mr. Bortin: You will recall in the middle of the argument, during my argument I came to the point where my contention was that the banking department had no interest in these proceedings, and at that point you suggested that why did not other parties who felt they were interested come into this court and so on, and the argument ended abruptly, and it was put off until yesterday, and then today. [fol. 59] I don't know whether Your Honor wants to hear any further argument, but, of course, I could continue.

The Court: Well, now I have not read your brief yet, but I will not cross that bridge until I come to it, but if you

want to call our attention to the salient points in your brief orally, you may do so, otherwise we will consider the arguments closed. Mr. Willing, is there anything you would like to say?

Mr. Willing: I would only want about two minutes in reply to Mr. Bortin. At the close of Mr. Bortin's argument he stressed the fact that he was filing other bills in equity and that in due time the Secretary of Banking would be requested to file a petition for the appointment of a substituted trustee for the pools, and also, it was said that any participant in those mortgage pools had a right to file a petition for the appointment of a substituted trustee. That point I want to make clear to your Honor. We admit that. The difference between that point and the bills which are before your Honor is this: Laura Washington, Mary O'Brien and the third complainant in the third bill in equity are asking the Court, as I understand it, to take their participating certificates from the custody and control of the Secretary of Banking, and deliver those participating certificates to the Court's receiver. If that were their prayer, perhaps we would not be so interested in this case, and that is as far as they might go in the State Court, but the significance and importance of this case is that Laura Washington and Mary O'Brien are not only asking that the Court appoint a receiver for their particular pool, for their particular certificate, but a receiver for all of the participating certificates which aggregate, added at this time to Colonel Holden's representatives, approximately six million dollars, and as nearly as my recollection goes, there isn't fifty thousand dollars represented in all the bills in equity before your Honor.

[fol. 60] Now, these bills were filed on behalf—and this is not an argument, this is just directing the Court's attention to something—these bills were filed on behalf of the various complainants and such other persons who would desire to join, and up to the present time nobody has joined these complainants in their prayer for the appointment of receivers. Therefore, in considering all of the arguments which were advanced, I would like to have the Court to see that this is a bill in equity that requests the appointing of a substituted trustee not for the particular respects in which these complainants may have, and for the purpose of this argument have a legitimate interest, not for the

Court to appoint someone on behalf of their interests alone, but to appoint a receiver over two or three million dollars worth of other participating certificates in which these complainants in the present bills in equity can have no interest except one of association.

The Court: Mr. Willing, here is what I would — you to make plain to me. We have a bill in equity here asking for equitable relief on the part of persons who we all admit are interested, have a real live interest in the case. Now, as far as the Court can see, no one who has a correspondingly live, active interest has come forward in the case to object. It is true you represent the Banking Department, but as the statute discloses, and I believe we agree upon that, it would appear that the Banking Department has merely custody of the fund with the obligation imposed upon it to divest itself of that custody.

Now, is it your contention that the Banking Department has any other status than has been set forth, or do you allege that the Banking Department has a real, live, interest in this fund and its management? Now, that is what I want to get from you.

[fol. 61] Mr. Willing: If an ordinary receiver, whether appointed by this Court or the Court of Common Pleas has, and the interest can be distinguished on the one hand as a real, live interest and one as a mere custody or control, then if your Honor can see that distinction, I say that the Banking Department has a real, live interest, because it has this custody, but not to sit on those pools as a hen might sit on eggs and expecting something to hatch, that is not what they do, but it is active, more active than even in the handling of a closed bank, because when the bank is closed, the doors are locked and no activity goes on for awhile, but when a trust department of a bank is taken over, the law requires that that trust department can be active for the benefit of those persons who have an interest.

The Court: Yes.

Mr. Willing: Yes, sir.

The Court: Do you claim that the Banking Department has any other privilege in this case than the right, as you express it, to ask for a substituted trustee? Answer that question, please, if you will.

Mr. Willing: Between the time that it takes possession and the time it files the petition for the appointment of a

substituted trustee, it has every right in the matter that the defunct corporation had, the same as a trustee under a will. In other cases it would act in a different capacity, but whatever rights the defunct corporation has up until the time that they asked the Court to make the appointment of a substituted trustee, the Banking Department is the active custodian, receiver, or custodian, by whatever name you want to call it, until that Court wants to throw them out.

[fol. 62] The Court: You have had that control for about eight months?

Mr. Willing: From February until August.

The Court: Until September, now.

Mr. Willing: Well, September.

The Court: Very nearly seven months. During that time you have not exercised your privilege of asking for a substituted trustee. Now, isn't your thought that you can now deprive a person who has a live interest in it from coming to this court in the matter?

Mr. Willing: It is my thought——

The Court: You can answer that "yes" or "no."

Mr. Willing: It is my thought that I should say to your Honor that one of the men who was appointed receiver of one of these pools was actively in charge of these pools as the special deputy for a period of how many months I don't know, and he could probably tell your Honor what things were done which were under his jurisdiction that I know nothing about, because I have never had anything to do with this bank prior to this case.

Mr. Bortin: Your Honor, let me have a few words. Mr. Willing has suggested the idea that every participating certificate holder should come individually and ask for a substituted trustee or a fiduciary for his particular interest in that pool. That is a very impractical thing, because there may be five or six hundred of these participating certificate holders, and it would be impossible, no more than it would be possible for each creditor to come in and ask for the appointment of a receiver individually for his particular interest in the corporation's assets. The one request for the appointment of a substituted fiduciary represents the interests of a number of holders.

[fol. 63] Now, with respect to having a substituted fiduciary appointed, Mr. Willing was arguing that the Banking Department feels that no one has joined these people in

their request for the appointment. Now, I want to call your Honor's attention to the Act of 1933, which is the act that the Banking Department and the Attorney General are using in support of their argument. I have here an opinion by the Attorney General which reads:

"The owner of an undivided interest——" I am reading from page 81 "—in any mortgage or securities pool or in a special mortgage or securities pool probably has the right to ask for a substituted fiduciary at any time."

That is what it says.

The Court: That must be very recent.

Mr. Bortin: Certainly, it is very recent.

The Court: Who is that by?

Mr. Bortin: It must be by the Attorney General.

Mr. Willing: It is by the Attorney General.

Mr. Bortin: That certainly eliminates the argument about that, anyone has the right to file such a petition at any time either before or after the filing of the account by the secretary.

The Court: Is that in your brief?

Mr. Bortin: Yes.

The Court: I will take that under consideration.

Mr. Willing: I am going to file a motion to dismiss the bill of the third case that was filed.

The Court: Would you mind stating for the record just what you would want the Court to do? It is better if we get it down on the record so that we can know just what [fol. 64] we are deciding here, and also if an appeal should be taken from our decision.

I understand they would like to file an answer.

Mr. Willing: That is true.

The Court: You are staking your case upon the lack of jurisdiction of this Court.

Mr. Willing: There are four or five points. May I put it this way. We are stating of record there is pending before your Honor a motion to dismiss the bill in equity in the case of Laura A. Washington versus William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy, as Agent in Possession of Chester County Trust Company, which is under June Term, 1933, No. 7845.

There is also pending before your Honor a motion to dismiss the bill in equity of Mary A. O'Brien versus Wil-

liam D. Gordon, Secretary of Banking, and Robert F. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company, and that is endorsed as of June Term, 1933, No. 7849.

There is a third bill in equity of Emma R. Lindley versus William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company, and that is endorsed June Term, 1933, No. 7857.

To these three bills in equity, motions to vacate the appointment of the receivers, or, I should say, rather, to the two bills in the case of the O'Brien bill and the Laura Washington bill, motions were filed to vacate the appointment of receivers and to dismiss the bills in equity for reasons which are set out in the motions to vacate and in the motions to dismiss. It is on that motion to vacate and motion to dismiss that the argument was made before your Honor and continued until today, and that is the record.

[fol. 65] The Court: As to the third bill, do we agree that it is to be taken into consideration together with the first two bills and to be treated as if it were one case?

Mr. Willing: Yes.

The Court: So that whatever is done with reference to the first two bills in equity would apply to the third bill?

Mr. Willing: Yes.

Mr. Bortin: In other words, as I understand it, if the motions of Mr. Willing are dismissed, then your Honor is in a position to appoint a temporary receiver in the third bill?

The Court: Yes.

Mr. Bortin: And then the petition to dismiss and the petition to vacate will fall as a matter of Court.

The Court: And the rights of the defendant in the third bill will apply as in the first two.

Mr. Willing: That is right.

Mr. Bortin: That is right.

The Court: What we want to do is get this thing head on so that there will not be any frittering of time away on immaterial points.

Mr. Bortin: I call your Honor's attention to the fact that your Honor had changed the order.

The Court: The temporary order?

Mr. Bortin: The temporary order by making it temporary receiver. Of course, if receivers are appointed in the third case it will be the same.

[fol. 66] IN UNITED STATES DISTRICT COURT

OPINION—Filed October 4, 1933

WELSH, J.:

On the 25th day of August, 1933, Laura A. Washington, a citizen of the State of Connecticut, instituted proceedings in equity against William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy, as agent in possession of the Chester County Trust Company.

The Bill sets forth that the complainant is the holder of a participation certificate issued by the Chester County Trust Company of West Chester, Pennsylvania, in the sum of $40,000.00, of a trust fund mortgage pool; that this trust fund mortgage pool represents moneys received by the Chester County Trust Company, to be maintained as a trust fund, separate and apart from its assets, and invested in first mortgages secured on real estate in the State of Pennsylvania; that participation certificates in this pool have been issued by the Chester County Trust Company to various persons aggregating in amount, the sum of $2,901,236.07, and that the funds have been invested in mortgages set apart from the assets of the trust company, as the property of complainant and other certificate holders.

The Bill further avers that on February 14, 1933, the Chester County Trust Company was closed at the direction of William D. Gordon, Secretary of Banking of the State of Pennsylvania, by reason of its insolvent and unsafe condition, and the Secretary of Banking thereupon took possession of its assets, and is in the process of liquidating same; that at the time that the Secretary of Banking took possession of the assets of the trust company, he also took custody of the assets of the trust fund forming the mortgage pool.

[fol. 67] The Bill alleges that since the Secretary of Banking took into his custody the said mortgage pool, interest payments on many of the mortgages comprising part of its

assets and taxes due on many parcels of real estate encumbered by mortgages of the mortgage pool, have not been paid by the mortgagors or received by the Secretary of Banking or his Deputy, and that little effort is made to secure the collection of such charges; that there is danger of sales of the encumbered real estate by reason of the nonpayment of taxes and little effort is made by the Secretary of Banking to compel payment of these taxes; that no interest or income has been received by the complainant or other certificate holders since the closing of the Chester County Trust Company; nor, has the Secretary of Banking filed an account in relation to the said mortgage pool; that the management is, therefore, making little effort to protect the assets of the trust fund to the detriment and damage of complainant and like holders of trust certificates. Complainant prays for the appointment of a Receiver to conserve and administer the assets of the trust estate comprising the mortgage pool, for the benefit of its certificate holders exclusively.

On the same day the complainant filed her Bill, she also filed a Motion for the appointment of a Receiver pending hearing on the Bill and Answer. A hearing was fixed on said motion for August 30, 1933. Due service was made of said Bill, Motion and Notice of Hearing.

On August 30, 1933, a hearing was held, at which time counsel for complainant and defendants appeared. Defendants' counsel vigorously opposed the appointment of a Receiver. No Answer was filed at the time, nor has it since been filed. After argument, and upon consideration of the averments of complainant's Bill, the Court granted complainant's Motion for appointment of a Receiver, and en- [fol. 68] tered an order appointing Edward W. Wells, Richard F. Ennis, Louis Breitinger, and John Hemphill, Receivers, with directions to take possession of all mortgages, property and assets comprising the trust mortgage pool originally held by Chester County Trust Company in its fiduciary capacity, but now in the custody of the Secretary of Banking, in possession of the Chester County Trust Company. Although the order appointing the Receivers did not specifically so state, it was intended that this appointment should be temporary only until hearing on Bill and Answer. The court subsequently modified its original

order so that the appointment was temporary until hearing on the Bill and Answer.

This matter is now before the Court on two petitions filed by the Secretary of Banking for the State of Pennsylvania, one to vacate the order of Appointment of Receivers, and the other to dismiss the Bill. The Court fixed Friday, September 22, 1933, as a time for hearing on the said petitions. At this time counsel for both complainant and defendants again appeared and argued the questions involved at length. The Secretary of Banking resisted the appointment of Receivers for the mortgage pool, principally on the ground that the Federal Court was without jurisdiction because, first, the action involved a suit against the State of Pennsylvania, and second, because the Secretary of Banking, having filed a certificate of taking possession of the Chester County Trust Company's assets in the Judgment Index of Chester County, that the Chester County Court alone retained jurisdiction.

It is somewhat difficult to understand the position of the Banking Department of the State of Pennsylvania in this case. What interest and standing has that department? Their position is one of bare, temporary custody, with the [fol. 69] duty and responsibility thrown upon them to divest themselves of even that status at the earliest possible moment. Section 40 of the Act of 1923 (1923, June 15th, P. L. 809).

Sub-Section B provides as follows:

"Substituted Fiduciaries.—Upon determining to liquidate the affairs of such corporation or person, the secretary shall forthwith give written notice to all parties interested in any such funds, property, or investments held in a fiduciary capacity, so far as such notice is practicable, requiring them within thirty days to apply to the proper court or official for the appointment of substituted fiduciaries to take the place of such corporation or person. On the failure or neglect of the parties so notified to make such application within the time designated, or in case the parties in interest can not be notified, the secretary shall himself apply for such appointment of substituted fiduciaries."

In order that this might be made perfectly plain and be beyond all question of doubt the amending Act of July 3, 1933, Sec. 801, specifically provides as follows:

"References in this act to funds, property, or investments held in a fiduciary capacity by an institution of which the secretary has taken possession, shall apply only to funds, property, or investments held in such fiduciary capacity by the trust department of such institution and shall not apply to funds, property, or investments which were held by the commercial department of such institution."

This Court continued the hearing on this case on two separate occasions in order to permit holders of participating certificates to appear and be heard. The Court required all such persons who desired to intervene to do so and expressed a request for an expression of their views. No [fol. 70] such holders of participating certificates have taken advantage of this offer and no one of such class is in any way concerned so far as the record in the instant case appears. At the last hearing it was stated by a member of the Bar present in the court that one of his associate members of the Bar desired him to state orally to the Court that participating holders in a large amount would prefer that the matter be adjudicated in the local courts of Chester County, Pennsylvania.

It would appear, therefore, that from the record that the banking department of the State of Pennsylvania, with the record above referred to, had challenged fairly and squarely the jurisdiction of this Court on the ground that jurisdiction conferred by the Constitution of the United States on non-resident plaintiffs does not apply. This contention is based on the argument that a statute of Pennsylvania, above referred to (Act of 1933) can deny to such non-resident plaintiffs the right to the jurisdiction of this Court.

The law on this subject as viewed by this Court was fully expressed in a full and complete opinion recently in the case of Elson v. Mortgage Building and Loan Association. The authorities and principle of law involved are there reviewed and set forth at length. The Court deems it unnecessary at this time to again do this. It may help clarify the question if some reference is made to the alleged assumption of jurisdiction by the Court of Common Pleas of Chester County. Section 604 of the act provides:

"Certificates of Possession; Filing.—A. The Secretary, upon taking possession of the business and property of an institution as receiver, shall forthwith, under the seal of

the Department, prepare in duplicate a certificate, to be known as the certificate of possession, setting forth that he has become receiver of the institution. It shall state the name of the deputy receiver whom the Secretary, pursuant to the provisions of this act, appoints to take charge of the [fol. 71] affairs of the institution, and shall set forth the duties which he delegates to such deputy receiver. If the Secretary does not appoint a deputy receiver prior to the date of the filing of the certificate of possession, or if he appoints a new deputy receiver or an additional one, or if he adds to the duties of the deputy receiver, he shall prepare, in duplicate, and file a supplement to the certificate of possession.

B. The Secretary shall file the original certificate of possession and the original of any supplement thereto in his office in Harrisburg, and the duplicate certificate of possession and the duplicate of any supplement thereto in the office of the prothonotary. The certificate of possession filed in the prothonotary's office, and any supplement thereto, shall be listed in the judgment index in the name of the institution as defendant and of the Secretary as plaintiff.

C. In addition the Secretary shall, as soon as possible, file a certified copy of the certificate of possession, and of any supplement thereto, in the office of the recorder of deeds in each county of the Commonwealth, or with the proper official in any other state or county, in which any real property shall be situated which belongs to the institution or title to which is in its name, or upon which there is a mortgage or other lien which belongs to the institution or title to which is in its name. Such copy shall be recorded in the current deed book, and shall be indexed in the grantors' index in the name of the institution and in the grantees' index in the name of the Secretary, or it shall be filed, indexed, or registered by whatever other method is provided by the law of the particular county, state, or country in which such real property is located."

It would seem from the provisions of the above act that the filing of a certificate which the defendants construe to be an assumption of court jurisdiction in Chester County [fol. 72] is really nothing of the kind. It merely amounts

to the making of a proclamation by which all persons are put upon notice of the new state of affairs existing with regard to the closed institution.

The comity which exists between jurisdictions, and which would give control to the tribunal first assuming it, must be an actual, real taking of the case in hand. It was admitted during the argument of the instant case that no judge of a Chester County Court had the power to refuse or reject anything done in this case by the Banking Department. This Court, therefore, holds that there has been no jurisdiction within the meaning of the term by the local court in question. This Court having affirmed the jurisdiction of the Federal Court in the instant case a word as to the motives which move it as a Chancellor to act would seem to be in order. It must be remembered that the Banking Department took charge of the defunct institution on February 14, 1933. Notwithstanding the fact that millions of dollars are concerned, and a large number of certificate holders are involved nothing has been done by the Banking Department to provide the means for an active, intelligent, responsible administration of its pools. Just why such a situation has continued to exist has not been explained. Non-resident petitioners in this case are dissatisfied with such inaction. In the exercise of their constitutional rights they have appealed to the equity side of this court for relief. They are alarmed over the safety of their holdings. No excuse, no explanation, and no promises of a future policy have been given. No interested group of fellow participants in the pool have entered an appearance or objected as a matter of record. This Court, therefore, feels that it not only has jurisdiction, but that in view of the status of the case its duty as a Chancellor is that that jurisdiction [fol. 73] be recognized and that the prayed for relief be granted.

The prayer of the petition to vacate the appointment of the Receiver is dismissed.

IN UNITED STATES DISTRICT COURT

DECREE—Filed October 26, 1933

And Now, to wit, October 26, 1933, it appearing that the Circuit Court of Appeals has allowed an appeal in this

case from the decree of October 4, 1933, overruling the motion to dismiss the bill and refusing the petition to vacate the decree appointing receivers; and it appearing that no formal decree was entered on October 4, 1933, to the above effect, although the opinion filed on that date concluded with the words: "The prayer of the petition to vacate the appointment of the receivers is dismissed and the motion to dismiss the bill is overruled";

It is Ordered and decreed that the following order be entered as of October 4, 1933:

The prayer of the petition to vacate the appointment of the receiver is dismissed and the motion to dismiss the bill is overruled.

Welsh, J.

Approved:

D. Bortin, Attorney for Plaintiff.

October 24, 1933.

[fol. 74] In United States District Court

Petition for Appeal—Filed October 16, 1933

To the Honorable, the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

The petition of William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, receiver of Chester County Trust Company, and of Robert G. Funkhouser, deputy receiver of Chester County Trust Company, respectfully represents:

The petitioners, who are the defendants above named, feeling aggrieved by the decree entered in the above-entitled cause on August 30, 1933, appointing receivers, and by the decree entered on September 22, 1933, amending the said decree of August 30, 1933, and by the decree entered on October 4, 1933, overruling and denying the defendants' motion to dismiss the bill of complaint, and dismissing the defendants' petition for an order to vacate the said decree appointing receivers, do hereby appeal from the said decrees to the Circuit Court of Appeals for the Third Circuit, for the reasons set forth in the assignments of error filed herewith; and pray that this appeal be allowed and that a

citation be allowed as provided by law and that a transcript of the record, proceedings and documents upon which the said decrees were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Third Circuit under the rules of the said Court in such cases made and provided.

And your petitioners further pray that the proper order be made in regard to security to be required of them, so that this appeal may act as a supersedeas.

[fol. 75] And your petitioners aver that your petitioner William D. Gordon has given bond, as required by law, conditioned for the faithful performance of his duties as Secretary of Banking of the Commonwealth of Pennsylvania, which bond is in the sum of $50,000, is executed by American Surety Company as surety, and expires on March 23, 1934; and that your petitioner Robert G. Funkhouser has given bond, as required by law, conditioned for the faithful performance of his duties as deputy receiver of Chester County Trust Company, which bond is in the sum of $200,000, is executed by the United States Fidelity & Guaranty Company as surety, and expires on May 8, 1934.

Wherefore, your petitioners further pray that they may give their own bond, without surety, as the security to be required of them so that this appeal may act as a supersedeas.

Joseph K. Willing, Attorney for the Department of Banking of the Commonwealth of Pennsylvania; Shippen Lewis, Special Deputy Attorney General of the Commonwealth of Pennsylvania; Wm. A. Schnader, Attorney General of the Commonwealth of Pennsylvania; by Shippen Lewis, Special Deputy Attorney General, Attorneys for the Petitioners.

[fol. 76] *Duly sworn to by Robert G. Funkhouser. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

ORDER DENYING APPEAL—Filed October 16, 1933

Order refused and petition for appeal dismissed.

(Sgd.) Welsh, J.

[fol. 77] IN UNITED STATES DISTRICT COURT

STIPULATION RE NOTES OF TESTIMONY—Filed November 27 1933.

It is hereby stipulated by and between Shippen Lewis, Esq., Joseph K. Willing, Esq., William S. Schnader, Esq., attorneys for the defendants herein, and Hirschwald, Goff & Rubin, Esqs., and David Bortin, Esq., attorneys for the plaintiffs herein, that all of the testimony taken in the above-captioned cases be printed as part of the record in the Circuit Court of Appeals.

(Sgd.) William S. Schnader, Shippen Lewis, Joseph K. Willing, Attorneys for the Defendants; Hirschwald, Goff & Rubin, David Bortin, Attorneys for the Plaintiffs.

[fol. 78] IN UNITED STATES DISTRICT COURT

AMENDED PRÆCIPE SUR TRANSCRIPT OF RECORD—Filed November 2, 1933.

To the Clerk of the United States District Court:

In making up the record sur appeal in the above case you will include the following papers:

Docket entries.

Bill of complaint.

Motion for appointment of receivers.

Decree of August 30, 1933 (write "temporary" in handwriting over carets wherever it so appears in the original).

Petition and order for citation in contempt.

Answer to contempt proceedings.

Summary of testimony as filed herewith on hearing held September 5, 1933.

Motion to dismiss bill.

Petition to vacate order.

Supplement to said petition.

Decree of September 22, 1933, amending decree of August 30, 1933.

Opinion of court dated October 4, 1933.

Decree of October [illegible], 1933, entering a decree as of October 4, 1933, denying prayer to vacate and refusing motion to dismiss bill.

Petition for appeal and supersedeas.

[fol. 79] Order denying prayer for appeal and refusing supersedeas.

Summary of testimony as filed herewith on hearing held September 26, 1933.

Amended præcipe sur transcript of record.

Acceptance of service of amended præcipe and of notice of lodgment of summary of testimony.

Clerk's certificate.

(Sgd.) Shippen Lewis, Special Deputy Attorney General.

November —, 1933.

Acceptance of Service

I accept service of a copy of the amended præcipe sur transcript of record and of notice of lodgment of the summary of testimony and that the said summary of testimony will be presented to the Court for approval on November 13, 1933, without agreeing that said record of testimony is correct.

(Sgd.) David Bortin, Attorney for Appellee.

November 1, 1933.

[fol. 80] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 81] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT

Term, 1933

No. 5280

[Title omitted]

PETITION FOR SUPERSEDEAS

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Third Circuit:

The petition of William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, Receiver of Chester County Trust Company, and Robert G. Funkhouser, Deputy

Receiver of Chester County Trust Company, respectfully represents:

1. Your petitioner, William D. Gordon, is, and has been since before February 14, 1933, the Secretary of Banking of the Commonwealth of Pennsylvania, and by virtue of the powers and duties conferred upon him by the laws of Pennsylvania, took possession on February 14, 1933, of the business and property of Chester County Trust Company, a corporation having its place of business in the Borough of West Chester, in Chester County, Pennsylvania.

[fol. 82] 2. Immediately upon taking possession as above stated, William D. Gordon filed a certified copy of his certificate of possession with the prothonotary of the Court of Common Pleas of Chester County, who docketed and indexed it as required by the laws of Pennsylvania.

3. Your petitioner, Robert G. Funkhouser, is the Deputy Receiver of Chester County Trust Company, duly appointed by the Secretary of Banking in accordance with the laws of Pennsylvania.

4. Chester County Trust Company operated a mortgage trust fund, or mortgage pool, which is the subject of controversy in this cause, against which pool there had been issued to various participants certificates of interest aggregating far in excess of one million dollars.

5. Under the laws of Pennsylvania the Secretary of Banking has all the powers of a general receiver appointed by a court of equity with respect to the business and property of the Chester County Trust Company, and he is especially charged by statute with certain duties with respect to the said mortgage pool. Under the laws of the United States and of the Commonwealth of Pennsylvania the Court of Common Pleas of Chester County has sole jurisdiction of the Secretary of Banking as receiver of Chester County Trust Company, of his management of the said mortgage pool, and of the actions of your petitioners with respect to the said pool.

6. Complainant in this cause has filed a bill in equity in the United States District Court for the Eastern District of Pennsylvania, praying for the appointment of receivers of the said mortgage pool. Before the time for filing an an-

[fol. 83] swer to this bill had expired and before any answer had been filed, without taking any testimony in support of the bill, and upon less than one hour's notice of hearing to counsel for your petitioners, his Honor, Judge Welsh, entered a decree on August 30, 1933, appointing receivers of the said mortgage pool. A copy of this decree is hereto annexed, marked Exhibit A.

7. On September 4, 1933, the Court of Common Pleas of Chester County ordered an injunction to issue restraining your petitioners or any of their agents from delivering any asset or record of the said mortgage pool to any receiver appointed by the United States District Court. A copy of this injunction, which was duly issued and served, is hereto annexed, marked Exhibit B.

8. On September 5, 1933, your petitioner, Robert G. Funkhouser, with his two assistants, Albert N. Pusey and C. Archer Darlington, appeared before his Honor, Judge Welsh, in pursuance of a rule to show cause why they should not be adjudged in contempt for failing to turn over the assets and records of the said mortgage pool. At this hearing a motion to dismiss the bill of complaint and a petition to vacate the appointment of the receivers were filed by the Attorney General on behalf of your petitioner. It was then stated by his Honor, Judge Welsh, and agreed to by counsel for both parties that the receivers should act no further in the premises unless and until his Honor, Judge Welsh, should overrule the said motion and dismiss the said petition after argument thereon. September 22, 1933, was fixed for the said argument. Thereafter, on September 15, 1933, Shippen Lewis, Esq., Special Deputy Attorney General and an attorney of record for your petitioner, confirmed the said understanding by a letter to his Honor [fol. 84] Judge Welsh and by sending a copy to counsel of record for the complainant. A copy of the said letter is hereto attached marked Exhibit C.

At the said hearing on September 5, 1933, and repeatedly thereafter, it was stated by his Honor Judge Welsh that he wished to make such an order as would squarely raise the question of jurisdiction for decision by the Circuit Court of Appeals, to which your petitioner was prepared to appeal on September 5, 1933, prior to the aforesaid understanding.

9. On September 22, 1933, his Honor Judge Welsh, of his own motion, entered a decree amending his decree appointing receivers by the insertion of the word "temporary" before the word "receivers." A copy of this decree of September 22 is hereto annexed marked Exhibit D.

10. At the said argument on September 22, 1933, his Honor Judge Welsh continued the matter until September 25, 1933, so as to give holders of participation certificates in the said pool an opportunity to be heard, stating, however, that he would hear no one who did not submit to the jurisdiction of his court. On September 26, 1933, A. M. Holding, Esq., and Ernest Harvey, Esq., of the Chester County Bar, were present to inform the Court that they and their associates represented holders of certificates with a large aggregate value and that their clients objected to the proposed receivership and wished the pool managed or liquidated by a substituted fiduciary ap-ointed by the Court of Common Pleas of Chester County. However, his Honor Judge Welsh was unable to hear argument on September 25th and continued the case until September 26th, when Messrs. Holding and Harvey were unable to attend. After the argument on September 26th, his Honor Judge Welsh took the case under consideration and thereafter filed an opinion and an order on October 4, 1933.

[fol. 85] 11. On October 4, 1933, his Honor Judge Welsh entered a decree overruling the said motion and refusing the said petition. A copy of this decree and of the opinion on which it is based are attached hereto marked Exhibit E.

12. On October 9, 1933, your petitioners presented to his Honor Judge Welsh a petition to allow an appeal from the said decree of August 30, 1933, appointing receivers, from the said decree of September 22, 1933, amending the decree appointing receivers and from the said decree of October 4, 1933, overruling the motion to dismiss the bill, and refusing the said petition to vacate. His Honor Judge Welsh refused to allow this appeal or to grant a supersedeas.

13. Your petitioner William D. Gordon has given bond, as required by law, conditioned for the faithful performance of his duties as Secretary of Banking, which bond is in the sum of $50,000, is executed by American Surety Company as surety, and expires on March 23, 1934; and your

petitioner Robert G. Funkhouser has given bond, as required by law, conditioned for the faithful performance of his duties as deputy receiver of Chester County Trust Company, which bond is in the sum of $200,000, is executed by the United States Fidelity & Guaranty Company as surety, and expires on May 8, 1934.

Wherefore your petitioners pray your Honorable Court to allow an appeal from the said decrees for the reasons set forth in the assignments of error filed herewith; and your petitioners further pray that a citation be allowed as provided by law and that a transcript of the record, proceedings and documents upon which the said decrees were passed, duly authenticated, be directed to be sent to your [fol. 86] Honorable Court; and your petitioners further pray that an order be made in regard to the security to be required so that the said appeal shall act as a supersedeas; and your petitioners further pray that the said security shall consist of your petitioners' own bond without surety.

Joseph K. Willing, Attorney for the Department of Banking of the Commonwealth of Pennsylvania; Shippen Lewis, Special Deputy Attorney General of the Commonwealth of Pennsylvania; Wm. A. Schnader, Attorney General of the Commonwealth of Pennsylvania; by Shippen Lewis, Special Deputy Attorney General.

Duly sworn to by Robert G. Funkhouser. Jurat omitted in printing.

[fol. 87] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER ALLOWING APPEAL

And now, to wit, October 9, 1933, on consideration of the foregoing petition and on motion of Joseph K. Willing, Esq., Shippen Lewis, Esq., and William A. Schnader, Esq., attorneys for the petitioners, it is hereby ordered that an appeal is allowed to the United States Circuit Court of Appeals for the Third Circuit from the decree of the United States District Court for the Eastern District of Pennsylvania, in the above cause, dated August 30, 1933, appointing receivers, and from the decree of the said court

dated September 22, 1933, amending the said decree appointing receivers and from the decree of October 4, 1933, overruling the motion to dismiss the bill and refusing the petition to vacate the said decree appointing receivers.

It is further ordered that the bond on appeal be fixed at the sum of $250, the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

And it is further ordered that the said bond shall be the bond of the appellants without surety.

By the Court:

Victor B. Woolley, C. J.

[fols. 88-90] EXHIBIT A TO PETITION FOR APPEAL

[Omitted. Printed side page, 25 ante.]

[fol. 91] EXHIBIT B TO PETITION FOR APPEAL

Injunction

CHESTER COUNTY, ss:

The Commonwealth of Pennsylvania to Robert G. Funkhouser, Deputy Receiver of Chester County Trust Company, your agents, workmen, laborers, and servants, Greeting:

Whereas, it hath been represented to us in our Court of Common Pleas, sitting in Equity, for the County of Chester aforesaid, in a certain cause there depending, wherein Harvey Fitzsimmons is complainant, and you and William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, Receiver of Chester County Trust Company, are defendant, on the part of the complainant, that he has lately exhibited his bill of complaint in our said Court of Common Pleas, sitting in Equity, against you, the said Defendant, praying to be relieved touching the matter [fol. 92] herein contained, and that thereupon, upon motion for Injunction and hearing thereof, and upon the said complainant filing a bond in the penal sum of One thousand dollars ($1000.00) Dollars, with surety approved by the Court as required by the Acts of Assembly in such case made and provided, it was ordered that a preliminary injunction issue pursuant to the prayer of the said bill to restrain you, the said defendant, until further order, from

delivering to any or all persons appointed Receivers by the United States District Court for the Eastern District of Pennsylvania, all mortgages, securities, books, papers, records, and all other matters appertaining to the mortgage participation pool until hearing shall be had on this Bill, which is hereby set for September 8th, 1933, at 9 A. M., and thereafter to abide further order.

We therefore, in consideration of the premises aforesaid, do strictly command and enjoin you, the said Robert G. Funkhouser, Deputy Receiver as aforesaid, Your agents, workmen, laborers, and servants, and all and every one of you, that you do from henceforth, altogether absolutely desist from delivering to any or all persons appointed Receivers by the United States District Court for the Eastern District of Pa., all mortgages, securities, books, papers, records and all other matters appertaining to the mortgage participation pool until hearing shall be had on this Bill, which is hereby set for September 8th, 1933, at and thereafter to abide further order. Until our said Court shall make other order to the contrary.

Witness the Hon. J. Frank E. Hause, President Judge of our said Court at West Chester, Pa., this 4th day of September, A. D., 19–

Certified from the Record:

Lewis R. Downing, Prothonotary, by —— ——, Dep. Prot.

[fol. 93] EXHIBIT C TO PETITION FOR APPEAL

September 15, 1933.

Laura A. Washington v. William D. Gordon, Secretary of Banking

U. S. District Court, E. D. of Pa., No. 7845, June Term, 1933

Mary A. O'Brien v. William D. Gordon, Secretary of Banking

U. S. District Court, E. D. of Pa., No. 7849, June Term, 1933

Hon. George A. Welsh. Post Office Building, Philadelphia, Pa.

DEAR JUDGE WELSH: In the above cases, we are ready at any time to carry out the agreement made with you by the

Attorney General at side bar on September 5th. It was then agreed that you would make orders overruling our motions to dismiss any denying our petitions to vacate; that we would then give possession of the assets and records of the mortgage pools to the persons named as receivers, the assets and records remaining undisturbed in the bank; that we would then promptly appeal to the Circuit Court and you would allow a supersedeas in each case; and that possession of the assets and records would then be immediately returned to us.

However, I understand that the present agreement with you is that our motions and petitions shall be argued on September 22nd. I hope that you will find it possible to have all three judges sit at that time, as we consider this a very important matter.

Yours very truly,

Shippen Lewis, Special Deputy Attorney General.

SL:D

[fol. 94] Exhibit D to Petition for Appeal.

[Omitted. Printed side page, 55 ante.]

Recital as to Exhibit E to Petition for Appeal.

Opinion

See opinion of Judge Welsh, printed at pages 66 to 73 of this Record.

[fol. 95] In United States District Court, Eastern District of Pennsylvania, June Term, 1933

No. 7849

In Equity

[Title omitted]

Assignments of Error—Filed October 9, 1933

And now, to wit, this ninth day of October, 1933, come the defendants in the above-entitled cause and file the following assignments of error:

1. The United States District Court for the Eastern District of Pennsylvania erred in entering the following decree of August 30, 1933, appointing receivers:

[fol. 96] In the District Court of the United States for the Eastern District of Pennsylvania, June Term, 1933

In Equity

No. 7849

Mary A O'Barr, Complainant,

vs.

William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company, Defendants.

Order

And now, to wit, this 30th day of August, A. D. 1933, upon consideration of the within Bill and after hearing thereon, and upon motion of David Bortin, Esquire, Attorney for the Complainant, it is hereby

Ordered that John Hemphill and J. Louis Breitinger, be appointed Receivers of trust fund mortgages aggregating $1,742,404.91 against which Certificates were issued by the Chester County Trust Company, located at West Chester, Pennsylvania, and now in possession of William D. Gordon, Secretary of Banking, of the State of Pennsylvania, by Robert G. Funkhouser, his Special Deputy as Agent in Possession of Chester County Trust Company, to hold and preserve all the mortgages, property and assets, real, personal and mixed, of whatsoever kind and description including any cash on hand and belonging to and being a part of the said trust fund, and it is further

[fol. 97] Ordered that the said Receivers be and — authorized wherever necessary to demand, sue for, collect or institute and prosecute any actions or suits in law or equity for the recovery of any interest or principal of mortgages, or both, and, wherever necessary, to institute foreclosure proceedings upon default of any of the terms or provisions of said mortgages, when, in the judgment or discretion of the said Receivers, such action is desirable and necessary, and

to defend, compromise, adjust, intervene or become a party to any suits or actions in law or equity, as may be necessary in the judgment of the Receivers for the proper protection and maintenance of the assets of the said mortgaged trust fund and the carrying out of the terms of this decree, and likewise to defend, compromise, adjust or otherwise dispose of any and all suits, actions and proceedings that may now be pending and embracing any of the assets of the said trust fund mortgages and to take any other action or proceedings which in the judgment of the said Receivers may be advisable or proper for the protection of the assets of said trust fund mortgages, and the said William D. Gordon, Secretary of Banking of the State of Pennsylvania, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company, and the Chester County Trust Company and any of their agents, deputies or officers are forthwith bound, upon demand of the Receivers to turn over and deliver to them any books, papers, moneys, deeds, mortgages, bonds, property, vouchers or other assets or papers representing property under their control and belonging to the said mortgaged trust fund, and it is further

Ordered and decreed that the defendants, their servants, agents and employees are hereby enjoined from taking any action which might be hostile to or interfere with the conduct or management of the said mortgaged trust fund by the Receivers with leave, however, to any party in interest [fol. 98] to have the order herein modified, all moneys received by the said Receivers to be deposited in a designated depository, and that they advise the Clerk of this Court in writing of the name of the depository and of the date of the opening of the account therein, and it is further

Ordered that the said Receivers be, and are hereby authorized in their discretion to employ such servants, attorneys, and counsel as may be in their judgment advisable or necessary in the management, conduct, control or custody of the said mortgaged trust fund, and the said Receivers be and are hereby authorized to make such payments and disbursements as may be needful or proper for the preservation of the assets of said mortgaged trust fund, and it is further

Ordered and decreed that the Receivers may enter into such agreements, employ such agents in connection with

the management, care and preservation of the said mortgaged trust fund as they may deem advisable, subject to the approval of the Court in advance, and they are authorized to incur such expenses and make such disbursements as may, in their judgment, be advisable or necessary in connection with the care, preservation and maintenance of the said mortgaged trust fund, and it is further

Ordered that the Receivers within 30 days of their appointment, file with the Court a preliminary report and inventory of the assets and condition of the said mortgaged trust fund coming into their possession as Receivers, and it is further

Ordered that the said Receivers make quarterly reports to this Court as to the condition of said mortgaged trust fund and that security *to* be entered by the said Receivers in the sum of $150,000.00.

It is further ordered that when the amount coming into the hands of the said Receivers shall exceed the sum of [fol. 99] $150,000.00 that the said Receivers shall file additional security.

By the Court:

(Sgd.) Welsh, J.

2. The United States District Court for the Eastern District of Pennsylvania erred in entering the following decree on September 22, 1933:

"And now, to wit, this 22nd day of September A. D. 1933, it appearing to the court that its order entered on the 30th day of August A. D. 1933 in the above matter wherein John Hemphill and J. Louis Breitinger were appointed receivers, failed to set forth that the appointment of such receivers was Temporary until hearing on Bill and Answer, although such temporary appointment was intended, it is

Ordered and decreed that the said order be and it is hereby amended so that John Hemphill and J. Louis Breitinger shall only have the rights, duties and privileges of Temporary Receivers in the above matter until hearing on Bill and Answer or other disposition of the cause, and that Wherever the word Receiver or Receivers appears that the word 'Temporary' shall precede it."

3. The United States District Court for the Eastern District of Pennsylvania erred in refusing to grant the defend-

ants' petition to vacate and set aside the said decree of August 30, 1933, appointing receivers.

4. The United States District Court for the Eastern District of Pennsylvania erred in overruling the defendants' motion to dismiss the bill of complaint, which motion was as follows:

"And Now, September 5, 1933, come the defendants, by their solicitors, Joseph K. Willing and Shippen Lewis, and [fol. 100] move the Court to vacate and set aside the order entered on August 30, 1933, appointing receivers, and to dismiss the Bill of Complaint for want of equity, for the following reasons:

1. From the face of the bill and from the laws of Pennsylvania it appears that the defendant, William D. Gordon, is in possession of the business and property of the Chester County Trust Company by virtue of the laws of Pennsylvania and that he has, with respect to those assets, all the powers and duties of a general receiver appointed by any Court of Equity in Pennsylvania, except as such rights, powers and duties are increased or limited by the provisions of the Department of Banking Code which became effective on July 3, 1933.

2. From the face of the bill and from the laws of Pennsylvania it appears that the defendant, William D. Gordon, as Secretary of Banking, in possession of the Chester County Trust Company is 'responsible to the Court in which the Certificate of Possession is filed and not to any other court'.

3. From the face of the bill and from the laws of Pennsylvania it appears that the Court of Common Pleas of Chester County have already assumed jurisdiction of the defendants, William D. Gordon and Robert G. Funkhouser, in their respective capacities of Receiver and Deputy Receiver of Chester County Trust Company.

4. From the face of the bill and from the laws of Pennsylvania it appears that the defendants are bound to file an account as to the said mortgage pool with the Court of Common Pleas of Chester County, and to deliver the assets of the pool only to a substituted fiduciary appointed by that Court, unless all the owners of undivided interests in

the said pool agree upon the delivery of those assets to a person designated by them.

5. It does not appear in the bill that the Court of Common Pleas in Chester County or the owners of all undivided [fol. 101] interests in the pool have authorized the defendants to deliver any assets or records of the said mortgage pool to anyone.

6. From the face of the bill it does not appear that the complainant has made any effort to procure the appointment by the Court of Common Pleas of Chester County, of a substituted fiduciary of the said mortgage pool, as provided by the laws of Pennsylvania.

7. The bill does not state any facts to show that any damage has been done or will be done to any party in interest if receivers are not appointed.

8. The complainant has an adequate remedy by application to the Court of Common Pleas of Chester County for the appointment of a substituted fiduciary of the said mortgage pool.

9. The District Court of the United States has no authority to appoint, under the title of receivers, persons who are in fact intended to act as substituted fiduciaries of the said mortgage pool.

10. The United States District Court has no authority to interfere with the Commonwealth of Pennsylvania in the exercise of the Commonwealth's powers.

Joseph K. Willing, Attorney for the Department of Banking of the Commonwealth of Pennsylvania; Shippen Lewis, Special Deputy Attorney General of the Commonwealth of Pennsylvania, Solicitors for Defendants."

5. The United States District Court for the Eastern District of Pennsylvania erred in entering the following decree on October 4, 1933:

[fol. 102] "The prayer of the petition to vacate the appointment of the receiver is dismissed and the motion to dismiss the bill is overruled."

Joseph K. Willing, Attorney for the Department of Banking of the Commonwealth of Pennsylvania;

Shippen Lewis, Special Deputy Attorney General of the Commonwealth of Pennsylvania; Wm. A. Schnader, Attorney General of the Commonwealth of Pennsylvania, by Shippen Lewis, Special Deputy Attorney General, Attorneys for the Defendants.

[fol. 103] IN UNITED STATES CIRCUIT COURT OF APPEALS, OCTOBER TERM, 1933

No. 5279

[Title omitted]

PETITION FOR LEAVE TO INTERVENE—Filed January 4, 1934

To the Honorable, the Judges of the Circuit Court of Appeals of the United States of America, Second Circuit:

The petition of the undersigned respectfully represents:

1. That the Chester County Trust Company was chartered under the laws of Pennsylvania, on October 13, 1900.

2. That, thereafter and continuously until taken over by the Secretary of Banking of the Commonwealth of Pennsylvania, as hereinafter stated, it was engaged, at West Chester, Chester County, Pennsylvania, in the business of [fol. 104] banking, the investment of moneys, the administration of trusts as fiduciary, and other like business as authorized under the laws of Pennsylvania.

3. In the administration of certain of the trusts in which the said Trust Company was trustee or fiduciary, it established and maintained a pool of first mortgages, secured upon real estate situated largely in Chester County aforesaid, and, to a lesser extent, in Delaware and Montgomery Counties, in the State of Pennsylvania; into which pool it invested certain of the funds of trust estates in which it was the fiduciary.

4. At the period at which the business and property of the said Trust Company were taken over by the said Secretary of Banking of the Commonwealth of Pennsylvania, the face value of mortgages in said pool amounted to the

sum of $2,901,236.07, of which sum $2,880,635.39 of the funds of said trusts were invested in said pool.

Of this sum of $2,880,635.39, your petitioners, as succeeding trustees, or as beneficiaries, are entitled to, or interested in the aggregate sum of $1,716,684.70; and your petitioners are, therefore, vitally interested in the expert and expeditious administration thereof.

5. On February 14, 1933, the Secretary of Banking of Pennsylvania took "possession of the business and property" of the said Chester County Trust Company, inclusive of the said pool of mortgages, in accordance with the mandates of the laws of Pennsylvania; and filed a certificate of said possession in his office at Harrisburg, Pennsylvania; and, thereafter, on February 15, 1933, filed a certified copy of said certificate in the office of the Prothonotary of Chester County, Pennsylvania; all in accordance with the requirements of The Banking Act of 1923.

[fol. 105] 6. That, thereafter, the said Secretary of Banking, as required by said law, entered on his duties as a receiver of the business and property of the said Trust Company, under the jurisdiction of the Court of Common Pleas of Chester County, Pennsylvania, as provided by law; and among the "business and property" of the said Trust Company, the said Secretary of Banking took possession of the mortgage pool hereinabove referred to.

7. Under the law of Pennsylvania pertaining thereto, the said Secretary of Banking of Pennsylvania, upon taking possession of the business and property of the said Trust Company, became expressly responsible to the Court of Common Pleas of Chester County aforesaid, in which its certificate of possession was filed.

That, thereafter, the said Secretary of Banking, as required by the law of Pennsylvania, maintained possession of all of the mortgages in the above-recited pool, and conducted the business of said pools from February 14, 1933, until the order or decree of the United States District Court for the Eastern District of Pennsylvania, herein referred to.

8. On August 25, 1933, a Bill in Equity (No. 7845, June Term, 1933), was filed in the said United States District Court by Laura A. Washington, a citizen of Connecticut,

against the said Secretary of Banking of the Commonwealth of Pennsylvania and his Special Deputy; in which she averred, inter alia, that little effort had been made by the said Secretary of Banking, or his Deputy, to secure the collection of interest upon the mortgages in said pool, or to compel the payment of taxes assessed against the mortgaged premises; and that there was danger of the sales of real estate or properties upon which the mortgages in said [fol. 106] pool were secured, for non-payment of taxes, which averments are denied by your petitioners.

Said plaintiff, in her said Bill therefore prayed the appointment, by the United States District Court aforesaid, of a receiver or receivers to take possession and charge of the said mortgage pool, and to administer the same.

9. That, under and by virtue of the petition of the said Laura A. Washington, the said United States District Court for the Eastern District of Pennsylvania, without any notice to your petitioners, and, as they are advised, believe, and, therefore, aver, without any notice whatever of said petition to any of the parties interested in the trusts, the funds of which were invested in said pool, or in the mortgages therein, appointed two receivers to take possession and control of said pool and to administer the same.

10. That the first and only notice that any of your petitioners had of the filing of the said petition, or of the said action thereon, was a report thereof in the public newspapers.

11. That your petitioners are earnestly opposed to the appointment of the Receivers as aforesaid to administer the said pool, for the following reasons,—

(1) The greater number of the mortgages in the aforesaid pool are secured upon real estate in Chester County, Pennsylvania. The remainder of the mortgages are secured upon real estate in Delaware and Montgomery Counties, Pennsylvania, counties of the same general character as the County of Chester; and, as we are advised, none of the said mortgages is invested upon property in the City of Philadelphia; that, by reason thereof, an experienced and otherwise duly qualified receiver or receivers resident in Chester County and familiar with the real estate

[fol. 107] values in Chester County and like counties, and, in very many instances, acquainted with the mortgagors and the character and record thereof, will be much better qualified to administer this trust, and will administer the same much more to the satisfaction of your petitioners and all others who are the real owners of the funds invested in this estate.

(2) Furthermore, your petitioners believe and, therefore, aver, that the administration of the said pool and the mortgages therein under the jurisdiction of the Court of Common Pleas of Chester County, Pennsylvania, will be greatly to the advantage of your petitioners and the other owners of the funds invested in said pool.

Your petitioners, therefore, believing that it will be greatly to their advantage to have this pool administered under the jurisdiction of the Court of Common Pleas of Chester County, and by a receiver or receivers appointed by said Court, respectfully pray your Honorable Court to permit them to intervene as parties appellant in the above-recited bill now pending in the Court.

And they will, etc.

	Amt. of interest in pool
	$91,000.00

John B. McCrery, by J. L. McCrery, His Father and Next Best Friend.

	Amt. of interest in pool
The Penna. Co. for Ins. on Lives and Granting Annuities, Substitute Trustee under the Will of James J. Williamson, decd.	$41,000.00
By Joseph Neff Ewing, Attorney.	
[fol. 108] Girard Trust Co., Substituted Trustee under the Will of John S. Worth, decd.	100,000.00
By Joseph Neff Ewing, Attorney.	
The First National Bank of West Chester, Substituted Fiduciary for the following Trusts:	
By W. Perry Tyson, Trust Officer.	
Frances M. Bonnell, Trust	10,000.00
Emma S. Darlington, Trust	7,917.35
Barbara Edge, Guardianship	8,200.00
Dorothy Edge, Guardianship	8,200.00
Judge Joseph Hemphill, Estate	23,882.41
Ann Hemphill D'Hendicourt, Trust	8,555.00

	Amt. of interest in pool
Mary B. Smith, Trust	6,868.96
Ethel Buckwalter Webb, Trust	9,500.00
Jennie Boone Willetts et al.	7,678.04
Ado Latch, Estate	4,071.00
Greenberger, Minors, Guardian	5,818.00
Hannah P. Downing, Trust	17,407.00
The Wentworth Association—	
U/w John Huey	10,000.00
U/w Rachel Townsend	3,372.00
By Isabel Darlington, Attorney.	
Ida J. Sharpless	10,439.77
By Isabel Darlington, Attorney.	
Est. Jesse J. Ferrell—	
Mary A. Meredith	2,000.00
James L. Ferrell	1,850.00
By Isabel Darlington, Attorney.	
[fol. 109] Est. Stephen L. Moore—	
Isabella M. March	3,420.68
By Isabel Darlington, Attorney.	
Est. of John R. Lilley, decd.—	
Lydia M. Skelton, Lilley S. Shank	16,141.65
By Isabel Darlington, Attorney.	
Est. Hannah Buffington, decd.	1,620.92
By Isabel Darlington, Attorney.	
Est. S. Winfield Todd, decd.	1,177.41
By Isabel Darlington, Attorney for Ethel N. Nagle.	
Est. Andrew Vincent Harold, Jr., a Minor	300.00
By Isabel Darlington, Attorney.	
Est. John Wm. Cogan, a weak-minded	7,300.00
By Isabel Darlington, Attorney.	
Est. Robert Eason	109.55
Est. Wm. Eason	87.61
By Isabel Darlington, Attorney.	
Thomas W. Baldwin, Trustee u/w of Jos H. Baugh, Deceased	12,380.48
Thomas W. Baldwin, attorney for Est. S. Ida Baugh, person of weak mind	19,700.00
Anna M. Sheller	312.25
Per Thomas W. Baldwin, Attorney.	
Estate of William A. Webb	4,500.00
Per Thomas W. Baldwin, Attorney.	

	Amt. of Interest in pool
[fol. 110] Estate of John G. Moses, The First National Bank of West Chester, Sub. Guardian By Thomas W. Baldwin, Attorney.	18,400.00
Estate of Carlos Bingham Cochran, The First National Bank of West Chester, Sub. Trustee By Thomas W. Baldwin, Attorney.	7,019.36
Estate of Caleb J. Hoopes, The First National Bank of West Chester, Sub. Guardian By Thomas W. Baldwin, Attorney.	3,400.00
Estate of Elwood Morgan, National Bank of Chester County and Trust Company, West Chester, Substituted Trustee By Thomas W. Baldwin, Attorney.	15,676.19
Maggie M. Vance's Estate, National Bank of Chester Valley, Sub. Trustee By Thomas W. Baldwin, Attorney.	1,184.92
Estate of Rachel S. Martin, National Bank of Chester County and Trust Company, West Chester, Substituted Trustee By Thomas W. Baldwin, Attorney.	500.00
Estate of Elwood Patrick, National Bank of Chester County and Trust Company, West Chester, Sub. Trustee By Thomas W. Baldwin, Attorney.	5,200.00
[fol. 111] J. Hampton Guthrie's Est By Thomas W. Baldwin, Attorney.	413.11
Estate of Frank U. Davis, The First National Bank of West Chester, Sub. Trustee By Thomas W. Baldwin, Attorney.	564.46
Estate of Linda A. Painter, decd. By J. Carroll Hayes, Attorney.	38,000.00
Farmers & Mechanics Natl. Bank, Phoenixville, Pa., Substituted Trustee u/w of Hamilton H. Gilkyson, Sr., decd. By A. M. Holding, Attorney.	37,937.50
New London Presbyterian Church	211.75
Katharine G. Humes Est. By A. M. Holding, Attorney.	150.00
New London Presbyterian Church, James W. McFadden Est. By A. M. Holding, Attorney.	199.75
C. M. Pennock (McClure Est.) By A. M. Holding, Attorney.	15,763.19

	Amt. of Interest in pool
William Grant By A. M. Holding, Attorney.	10,000.00
Helen Lewis By A. M. Holding, Attorney.	8,855.00
[fol. 112] Trustees for St. Peter's Church in the Great Valley By A. M. Holding, Attorney.	21,444.60
Mary Travilla Whiting By A. M. Holding, Attorney.	44,185.98
Norman W. Davis By A. M. Holding, Attorney.	383.06
Wilson W. Leamey By A. M. Holding, Attorney.	1,000.00
G. M. Huey By A. M. Holding, Attorney.	61,997.30
A. D. Huey By A. M. Holding, Attorney.	90,194.21
Alfred B. Jacob By A. M. Holding, Attorney.	400.00
Thomas S. Meller By A. M. Holding, Attorney.	7,624.98
Mary Hall Smedley By A. M. Holding, Attorney.	25,000.00
Emlen C. Fawcett By Holding & Harvey, Attorneys.	8,108.42
Mary Speakman Ruggles By A. M. Holding, Attorney.	1,057.35
[fol. 113] Chester S. Speakman By A. M. Holding, Attorney.	1,142.60
R. F. Ellis McClellan By A. M. Holding, Attorney.	2,850.00
William W. Good, Esther R. Good, Francis Good and Spencer T. Good By A. M. Holding, Attorney.	9,149.88
National Bank of Chester Valley, Trustee for Anna Reed Storey, Hunt B. Storey and Nancy Miles Storey By A. M. Holding, Attorney.	1,209.32
Annie Phillips Estate By A. M. Holding, Attorney.	4,750.00
Frank B. Buchanan Estate By A. M. Holding, Attorney.	16,072.51

	Amt. of Interest in pool
Emma R. Lindley By A. M. Holding, Attorney.	20,000.00
Estate of E. P. Timmons By A. M. Holding, Attorney.	110,461.26
E. J. Acker, Treasurer, Vincent Baptist Church, and Henry C. Dewees et al., Trustees By A. M. Holding, Attorney.	3,000.00
Wm. Gheen West Estate By H. R. McGowan, Attorney.	78,191.44
[fol. 114] Goshen Preparative Meeting of Friends By E. William Byle, Attorney.	1,100.00
Willistown Preparative Meeting of Friends By E. William Byle, Attorney.	6,000.00
J. Sharpless Serrill, Life Tenant u/w S. Emlen Sharpless, decd. By E. William Byle, Attorney.	3,657.35
Lillian A. Alexander By Arthur T. Parke, Attorney.	134.34
Andrew Bullock, Jr. By Arthur T. Parke, Attorney.	2,400.00
Annie M. Crossan By Arthur T. Parke, Attorney.	6,198.25
Clarissa M. C. Haines By Arthur T. Parke, Attorney.	1,065.90
Ellen Hickman By Arthur T. Parke, Attorney.	15,000.00
Leurana Moore By Arthur T. Parke, Attorney.	1,433.72
Mary McCamant Estate By Arthur T. Parke, Attorney.	26,637.66
Anna Belle Ronk By Arthur T. Parke, Attorney.	24.00
[fol. 115] Mary Elizabeth Ronk By Arthur T. Parke, Attorney.	23.98
Paul Elmer Ronk By Arthur T. Parke, Attorney.	24.00
Mary Louise Twaddell By Arthur T. Parke, Attorney.	629.68
Annie B. Weaver By Arthur T. Parke, Attorney.	7,516.84

	Amt. of interest in pool
Lida Williams Weaver	1,750.00
By Arthur T. Parke, Attorney.	
Faggs Manor Presbyterian Church (James Ramsey Trust)	500.00
By Arthur T. Parke, Attorney.	
Margaret Ramsey Est. Session Faggs Manor Pres.	1,000.00
By Arthur T. Parke, Attorney.	
William G. Roberts	30,000.00
By Arthur T. Parke, Attorney.	
Eva J. Reese Est. (for Faggs Manor Church, 1st National Bank of West Chester, Sub. Trustee)	2,449.04
By Arthur T. Parke, Attorney.	
Jane Ann Kerr Est.	1,398.74
By Walter S. Talbot, Attorney.	
[fol. 116] Amy Lee Kerr Est.	1,398.74
By Walter S. Talbot, Attorney.	
Georgianna Jack Clark Est.	1,128.18
By Walter S. Talbot, Attorney.	
Kathryn M. Clark Est.	1,138.67
By Walter S. Talbot, Attorney.	
Ravanna B. Graff Est.	12,700.00
By Walter S. Talbot, Attorney.	
Ashton B. Talbot Est.	5,400.00
By Walter S. Talbot, Attorney.	
John K. Bair Est.	39,999.45
By Walter S. Talbot, Attorney.	
Emma A. Baldwin (Caleb S. Baldwin) Est.	1,000.00
By Walter S. Talbot, Attorney.	
John Wesley Ranck Est.	675.00
By Walter S. Talbot, Attorney.	
Gertrude P. M. Arters Est.	5,651.80
By Walter S. Talbot, Attorney.	
Laura A. Lilley Est.	2,254.25
By Walter S. Talbot, Attorney.	
Garfield Milhaus Est.	1,646.00
By Walter S. Talbot, Attorney.	
[fol. 117] Francis A. Morrison Est.	2,920.00
By Walter S. Talbot, Attorney.	
Rebecca Townsend Est	260.00
By Walter S. Talbot, Attorney.	

	Amt. of interest in pool
Lewis W. Hickman Est.	1,100.00
By Walter S. Talbot, Attorney.	
Esther A. Hickman Est.	983.00
By Walter S. Talbot, Attorney.	
Harry Kelley Est.	125.00
By Walter S. Talbot, Attorney.	
Adelaide Budd Est.	2,675.00
By Walter S. Talbot, Attorney.	
Fairview Presbyterian Church and Cemetery	3,200.00
By Walter S. Talbot, Attorney.	
T. Elwood Lewis Est.	1,250.00
By Walter S. Talbot, Attorney.	
Mary J. Speakman Est.	500.00
By Walter S. Talbot, Attorney.	
Hadfield	135.00
By Walter S. Talbot, Attorney.	
Leona E. Winchester.	600.00
By J. Paul MacElree, Attorney.	
[fol. 118] James W. Ross	3,000.00
By J. Paul MacElree, Attorney.	
D. Frederick Hannum	1,000.00
By J. Paul MacElree, Attorney.	
Mary W. H. Anderson	6,000.00
By J. Paul MacElree, Attorney.	
James T. Branson Est.	2,875.23
By A. M. Holding, Attorney.	
Emmerene R. Moore Est.	38,257.57
By A. M. Holding, Attorney.	
Mary E. Branson Est.	4,514.72
By A. M. Holding, Attorney.	
Edith W. Hall Est.	10,050.00
By A. M. Holding, Attorney.	
Anna G. Brown, beneficiary u/w of Annie M. Sensenig, decd.	20,375.19
By A. M. Holding, Attorney.	
Annie G. Clayton	6,762.90
By A. M. Holding, Attorney.	
Dora W. Cope, u/w of Fred Cope	11,310.45
By A. M. Holding, Attorney.	
Lewis P. Good's Est.	9,149.88
By A. M. Holding, Attorney.	

	Amt. of interest in pool
[fol. 119] Maggie J. Haynes, beneficiary u/w of Abner Pyle, decd.	28,360.54
By A. M. Holding, Attorney.	
Ellen D. Longacre, u/w of Ellen R. Rutter, decd.	7,110.20
By A. M. Holding, Attorney.	
Charles Cresson Roberts et al., u/w of Mercy Anna Roberts	26,462.63
By A. M. Holding, Attorney.	
Mary E. Watson and Effie Watson, u/w of Annie M. Sensenig	6,000.00
By A. M. Holding, Attorney.	
Estate of Wilmer Thomson	7,622.13
By A. M. Holding, Attorney.	
Faggs Manor Presbyterian Congregation Church Cemetery, F. S. Brown, Treasurer	12,157.19
By A. M. Holding, His Attorney.	
Mary P. H. Furman	10,095.25
By I. N. Earl Wynn, Attorney.	
Catharine Black Wyers	2,273.82
By I. N. Earl Wynn, Attorney.	
C. Aurelia Hunt, et al.	942.04
By I. N. Earl Wynn, Attorney.	
[fol. 120] Casper P. Worthington	1,816.72
By I. N. Earl Wynn, Attorney.	
W. W. Hoopes, Trustee	27,860.80
By I. N. Earl Wynn, Attorney.	
Benjamin R. Walker	7,840.70
By I. N. Earl Wynn, Attorney.	
Mary E. Carver	23,126.50
By I. N. Earl Wynn, Attorney.	
Edna Lehman, weakminded	8,150.00
By I. N. Earl Wynn, Attorney.	
Emma I. Maxton,	2,577.68
By I. N. Earl Wynn, Attorney.	
Margaret A. King	5,905.26
By I. N. Earl Wynn, Attorney.	
George L. McSurdy, D/T	5,000.00
By I. N. Earl Wynn, Attorney.	
Sophia P. Wentworth	23,697.81
By I. N. Earl Wynn, Attorney.	
Clara Marshall	8,269.72
By I. N. Earl Wynn, Attorney.	

	Amt. of interest in pool
Lidie M. Cummings	2,375.79
By I. N. Earl Wynn, Attorney.	
William J. McKeowan	22,000.00
By I. N. Earl Wynn, Attorney.	
[fol. 121] Clara E. Jensen	8,000.00
By I. N. Earl Wynn, Attorney.	
Sarah J. Pennock McCreary	3,724.41
By I. N. Earl Wynn, Attorney.	
Lillian P. Thayssen	3,813.57
By I. N. Earl Wynn, Attorney.	
Dr. Thomas Parke	25,081.68
By I. N. Earl Wynn, Attorney.	
Eugene H. Walter	10,352.51
By I. N. Earl Wynn, Attorney.	

Duly sworn to by A. M. Holding. Jurat omitted in printing.

[fol. 122] IN UNITED STATES CIRCUIT COURT OF APPEALS, OCTOBER TERM, 1933

No. 5280

[Title omitted]

PETITION FOR LEAVE TO INTERVENE—Filed January 4, 1934

To the Honorable, the Judges of the Circuit Court of Appeals of the United States of America, Second Circuit:

The petition of the undersigned respectfully represents:

1. That the Chester County Trust Company was chartered under the laws of Pennsylvania, on October 13, 1900.

2. That, thereafter and continuously until taken over by the Secretary of Banking of the Commonwealth of Pennsylvania, as hereinafter stated, it was engaged, at West Chester, Chester County, Pennsylvania, in the business of banking, the investment of moneys, the administration of [fol. 123] trusts as fiduciary, and other like business as authorized under the laws of Pennsylvania.

3. That, in the investment of moneys for its patrons, it established and maintained a pool of first mortgages, se-

cured upon real estate situated largely in Chester County aforesaid, and, to a lesser extent, in Delaware and Montgomery Counties, in the State of Pennsylvania; into which pool it invested large sums of money furnished by its patrons for investment.

4. That, at the period at which the business and property of the said Trust Company were taken over by the Secretary of Banking of the Commonwealth of Pennsylvania, the face value of mortgages in said pool amounted to the sum of $1,743,570; against which it issued to patrons first mortgage certificates to the aggregate sum of $1,735,615.17; and funds belonging to its banking department to the amount of $8954.83.

Of these first mortgage certificates, certificates to the amount of $326,250.00, were issued to your petitioners; and they are, therefore, vitally interested in the expert and expeditious administration thereof.

5. On February 14, 1933, the Secretary of Banking of Pennsylvania took "possession of the business and property" of the said Chester County Trust Company, inclusive of the said pool of mortgages, in accordance with the mandates of the laws of Pennsylvania; and filed a certificate of said possession in his office at Harrisburg, Pennsylvania; and, thereafter, on February 15, 1933, filed a certified copy of said certificate in the office of the Prothonotary of Chester County, Pennsylvania; all in accordance with the requirements of the Banking Act of 1923.

6. That, thereafter, the said Secretary of Banking, as required by said law, entered on his duties as a receiver of [fol. 124] the business and property of the said Trust Company, under the jurisdiction of the Court of Common Pleas of Chester County, Pennsylvania, as provided by law; and among the "business and property" of the said Trust Company, the said Secretary of Banking took possession of the mortgage pool hereinabove referred to.

7. Under the law of Pennsylvania pertaining thereto, the said Secretary of Banking of Pennsylvania, upon taking possession of the business and property of the said Trust Company, became expressly responsible to the Court of Common Pleas of Chester County aforesaid, in which its certificate of possession was filed.

That, thereafter, the said Secretary of Banking, as required by the law of Pennsylvania, maintained possession of all of the mortgages in the above-recited pool, and conducted the business of said pools from February 14, 1933, until the order or decree of the United States District Court for the Eastern District of Pennsylvania, herein referred to.

8. On August 25, 1933, a Bill in Equity (No. 7849, June term, 1933), was filed in the United States District Court for the Eastern District of Pennsylvania, by Mary A. O'Brien, a citizen of the State of New Jersey, against the said Secretary of Banking of the Commonwealth of Pennsylvania and his special deputy; in which was averred, inter alia, that little effort was being made to secure the collection of the interest upon the mortgages in said pool; that little effort was being made to compel the payment of taxes upon the mortgaged property; that there was danger of sales by reason of the nonpayment of such taxes; and that, unless a receiver was appointed by said Court, to take possession of the said mortgages, assets, books and records forming said mortgage pool, that the interest on said mort-
[fol. 125] gages would continue in default; all of which averments are denied by your petitioners.

Said plaintiff, in her said bill, therefore, prayed the appointment, by the United States Court aforesaid, of a receiver or receivers to take possession and charge of the said mortgage pool and to administer the same.

9. That, under and by virtue of the petition of the said Mary A. O'Brien, the said United States District Court for the Eastern District of Pennsylvania, without any notice to your petitioners, and, as they are advised, believe, and, therefore, aver, without any notice whatever of said petition to any of the parties interested in the first mortgage certificates, the funds of which were invested in said pool, or in the mortgages therein, appointed two receivers to take possession and control of said pool and to administer the same.

10. That the first and only notice that any of your petitioners had of the filing of the said petition, or of the said action thereon, was a report thereof in the public newspapers.

11. That your petitioners are earnestly opposed to the appointment of the receivers as aforesaid to administer the said pool, for the following reasons—

(1) The greater number of the mortgages in the aforesaid pool are secured upon real estate in Chester County, Pennsylvania. The remainder of the mortgages are secured upon real estate in Delaware and Montgomery Counties, Pennsylvania, counties of the same general character as the County of Chester; and, as we are advised, none of the said mortgages is invested upon property in the City of Philadelphia; that, by reason thereof, an experienced [fol. 126] and otherwise duly qualified receiver or receivers resident in Chester County and familiar with the real estate values in Chester County and like counties, and, in very many instances, acquainted with the mortgagors and the character and record thereof, will be much better qualified to administer this pool, and will administer the same much more to the satisfaction of your petitioners and all others who are the real owners of the funds invested in this estate,

(2) Furthermore, your petitioners believe and, therefore, aver, that the administration of the said pool and the mortgages therein under the jurisdiction of the Court of Common Pleas of Chester County, Pennsylvania, will be greatly to the advantage of your petitioners and the other owners of the funds invested in said pool.

Your petitioners, therefore, believing that it will be greatly to their advantage to have this pool administered under the jurisdiction of the Court of Common Pleas of Chester County, and by a receiver or receivers appointed by said Court, respectfully pray your Honorable Court to permit them to intervene as parties appellant in the above-recited bill now pending in the Court.

And they will, etc.

	Amt. of interest in pool
Denney Tag Co	$25,000.00
Per Holding & Harvey, Its Attorneys.	
Cloyd R. Baldwin	12,000.00
Per Holding & Harvey, Its Attorneys.	
[fol. 127] Thos. J. Cassidy	4,000.00
Per Holding & Harvey, His Attorneys.	
James J. Anderson	4,300.00
Per Holding & Harvey, His Attorneys.	

	Amt. of interest in pool
Mary A. Anderson	4,300.00
Per Holding & Harvey, Her Attorneys.	
John Downing	1,000.00
Per Holding & Harvey, His Attorneys.	
Irving F. Walton	500.00
Per Holding & Harvey, His Attorneys.	
Irving F. Walton and Alma J. Walton	500.00
Per Holding & Harvey, Their Attorneys.	
Joseph Scattergood	2,000.00
Per Holding & Harvey, His Attorneys.	
Henry C. Dewees, Treasurer Vincent Baptist Cemetery Fund	2,000.00
Per Holding & Harvey, His Attorneys.	
Robert E. Stewart and Margaret Stewart	2,000.00
Per Holding & Harvey, Their Attorneys.	
Lucy I. Smedley	1,000.00
Per Holding & Harvey, Her Attorneys.	
A. W. Mackey	7,000.00
Per Holding & Harvey, His Attorneys.	
[fol. 128] Verna C. Cloud	1,000.00
Per Holding & Harvey, Her Attorneys.	
John B. Tanguy	2,000.00
Per Holding & Harvey, His Attorneys.	
Caroline P. Tanguy	1,000.00
Per Holding & Harvey, Her Attorneys.	
Albert J. Wilson	4,000.00
Per Holding & Harvey, His Attorneys.	
Samuel E. Worth	1,500.00
Per Holding & Harvey, His Attorneys.	
W. J. Dixon	2,500.00
Per Holding & Harvey, His Attorneys.	
Maurice R. Baker and June L. Baker	1,200.00
Per Holding & Harvey, Their Attorneys.	
Lawrence W. Moore	600.00
Per Holding & Harvey, His Attorneys.	
Anna Worth Russell	1,000.00
Per Holding & Harvey, Her Attorneys.	
Eliz. T. O'Brien	3,000.00
Per Holding & Harvey, Her Attorneys.	
Eugene C. Shener	500.00
Per Holding & Harvey, His Attorneys.	

	Amt. of interest in pool
[fol. 129] Katherine G. Kelly	2,000.00
Per Holding & Harvey, Her Attorneys.	
Helen Moore Heald	600.00
Per Holding & Harvey, Her Attorneys,	
Mary A. Moynihan	3,000.00
Per Holding & Harvey, Her Attorneys.	
Helen Moroney Carroll	1,000.00
Per Holding & Harvey, Her Attorneys.	
James L. Moroney	2,000.00
Per Holding & Harvey, His Attorneys.	
Mary I. Moroney	750.00
Per Holding & Harvey, Her Attorneys.	
Mary R. West	6,450.00
Per Holding & Harvey, Her Attorneys.	
Walter D. Nesbit	4,000.00
Per Holding & Harvey, His Attorneys.	
Pusey L. Moore	1,000.00
Per Holding & Harvey, His Attorneys.	
Elsie P. Casselberry	1,000.00
Per Holding & Harvey, Her Attorneys.	
J. Allen Way	2,200.00
Per Holding & Harvey, His Attorneys.	
[fol. 130] Rachie S. Way	3,400.00
Per Holding & Harvey, Her Attorneys.	
E. E. La Due	3,000.00
Per Holding & Harvey, Her Attorneys.	
Hanna E. Ewing	1,000.00
Per Holding & Harvey, Her Attorneys.	
Charles Baker	5,000.00
Per Holding & Harvey, His Attorneys.	
C. Harry Spencer	2,150.00
Per Holding & Harvey, His Attorneys.	
William J. Cornell	10,000.00
Per Holding & Harvey, His Attorneys.	
Etta M. Cornell	5,000.00
Per Holding & Harvey, Her Attorneys.	
Mary B. Slack	4,000.00
Per Holding & Harvey, Her Attorneys.	
Ada P. Walter	2,200.00
Per Holding & Harvey, Her Attorneys.	
Elmer E. Stiteler	2,500.00
Per Holding & Harvey, His Attorneys.	

	Amt. of Interest in pool
Wm. B. Harvey	4,500.00
Per Holding & Harvey, His Attorneys.	
[fol. 131] Lelah M. King	1,500.00
Per Holding & Harvey, Her Attorneys.	
Mary E. Stanley	1,700.00
Per Holding & Harvey, Her Attorneys.	
Irma Fertig, Violet V. Fertig, Admrs. of Elmer P. Fertig, dec'd	4,000.00
Per Holdign & Harvey, Their Attorneys.	
Martha J. Lukens	6,600.00
Per Holding & Harvey, Her Attorneys.	
Charles E. Ortlip and Saml. S. Ortlip	1,000.00
Per Holding & Harvey, Their Attorneys.	
Sarah E. F. Dale	500.00
Per Holding & Harvey, Her Attorneys.	
Nellie Reese Donache	2,000.00
Per Holding & Harvey, Her Attorneys.	
Mary B. Senior	800.00
Per Holding & Harvey, Her Attorneys.	
Isaac G. Roberts	2,800.00
Per Holding & Harvey, His Attorneys.	
Ella Swayne Roberts	500.00
Per Holding & Harvey, Her Attorneys.	
Margaret T. Buckwalter	3,000.00
Per Holding & Harvey, Her Attorneys.	
[fol. 132] Anna M. Baldwin Est	4,100.00
By Thomas W. Baldwin, Executor.	
Jacob M. Swayne	12,000.00
By Thomas W. Baldwin, His Attorney.	
Jacob M. Swayne (for Elizabeth N. Swayne)	4,500.00
By Thomas W. Baldwin, Her Attorney.	
Esther E. Baldwin	2,300.00
By Thomas W. Baldwin, Her Attorney.	
Clifton J. Marshall	5,000.00
By Thomas W. Baldwin, His Attorney.	
Clifton J. Marshall, Jr	1,000.00
By Thomas W. Baldwin, His Attorney.	
Clifton J. Marshall, Jr., and Arthur Marshall	1,000.00
By Thomas W. Baldwin, Their Attorney.	
Sarah B. Cochran	3,500.00
By Thomas W. Baldwin, Her Attorney.	

	Amt. of interest in pool
George W. Pierce	2,000.00
By Thomas W. Baldwin, His Attorney.	
Linnie M. Pratt	47,000.00
By Isabel Darlington, Her Attorney.	
Mary E. Speakman	5,500.00
By Isabel Darlington, Her Attorney.	
[fol. 133] Ida M. Ingram, E. Nora Lemmon	7,000.00
By Isabel Darlington, Their Attorney.	
C. Alfred Paxson, Exr., Ed. S. Paxson, dec'd	5,000.00
By Isabel Darlington, His Attorney.	
Ida J. Sharpless	3,000.00
By Isabel Darlington, Her Attorney.	
Thos. F. Furry, Exr	2,500.00
By Isabel Darlington, His Attorney.	
Elmer E. Stitler	2,500.00
By Isabel Darlington, His Attorney.	
West Chester Lodge, 908, Loyal Order of Moose	5,000.00
By H. R. McCowan, Attorney.	
Sarah E. Ross	14,000.00
By H. R. McCowan, Attorney.	
Samuel J. Richey	3,000.00
Per ——— ———, Attorney.	
James W. Ross	5,000.00
By J. Paul MacElree, Attorney.	
Elsie V. Boyd	450.00
By J. Paul MacElree, Attorney.	
Charles D. Boyd	450.00
By J. Paul MacElree, Attorney.	
[fol. 134] Jos. F. Parker Estate	1,000.00
I. N. Earl Wynn, Attorney.	
T. Ellsworth Moore Estate	2,400.00
I. N. Earl Wynn, Attorney.	
H. D. Ingram Estate	500.00
I. N. Earl Wynn, Attorney.	
Caroline Hannum Brown	3,500.00
By Arthur T. Parke, Attorney.	
F. S. Brown	2,000.00
By A. M. Holding, His Attorney.	
J. Clyde Brown	6,000.00
By A. M. Holding, His Attorney.	

Duly sworn to by A. M. Holding. Jurat omitted in printing.

[fol. 135] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

October Term, 1933

No. 5279

[Title omitted]

October Term, 1933

No. 5280

[Title omitted]

REFERENCE TO ARGUMENT

And afterwards, to wit, the fourth day of January, 1934, come the parties aforesaid by their counsel aforesaid, and these cases being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the twenty-eighth day of September, 1934, come the parties aforesaid by their counsel aforesaid, and the Court, now being fuly advised in the premises, renders the following decision:

[fol. 136] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD DISTRICT

October Term, 1933

No. 5279

WILLIAM D. GORDON, Secretary of Banking, and ROBERT G. FUNKHOUSER, Special Deputy, as Agent in Possession of Chester County Trust Company, Defendants-Appellants,

v.

LAURA A. WASHINGTON, Complainant, and EDWARD W. WELLS and RICHARD F. EWING, Receivers of Trust Fund Mortgages Aggregating $2,901,236.01, Against Which Certificates Were Issued by Chester County Trust Company, Appellees

October Term, 1933

No. 5280

WILLIAM D. GORDON, Secretary of Banking, and ROBERT G. FUNKHOUSER, Special Deputy, as Agent in Possession of Chester County Trust Company, Defendants-Appellants,

v.

MARY A. O'BRIEN, Complainant, and JOHN HEMPHILL and J. LOUIS BREITINGER, Receivers of Trust Fund Mortgages Aggregating $1,742,404.91, Against Which Certificates Were Issued by Chester County Trust Company, Appellees

Appeals from the District Court of the United States for the Eastern District of Pennsylvania

[fol. 137] OPINION—Filed September 28, 1934

Before Buffington, Davis and Thompson, Circuit Judges

DAVIS, Circuit Judge:

This is an appeal from a decree appointing receivers for two mortgage pools of the Chester County Trust Company located at West Chester, Pennsylvania. There are two cases here involving identically the same questions of law and practically the same facts. They will, therefore, be disposed of in a single opinion.

On February 14, 1933, the Secretary of Banking of the Commonwealth of Pennsylvania took "possession of the business and property" of the Chester County Trust Company, hereinafter called the Trust Company, in accordance with the provisions of the Act of Pennsylvania of June 15, 1923, P. L. 809, known as the Banking Act of 1923 and the Act of May 15, 1933, P. L. 565, known as the Department of Banking Code. On that day he filed a certificate of possession in his office at Harrisburg and on the following day he filed a certified copy of the certificate in the office of the prothonotary of Chester County in accordance with the requirement of the Act of June 15, 1923, which provides in section 22 that:

"When the secretary shall have duly taken possession of the business and property of a corporation or person as

provided in section twenty-one of this act, he shall forthwith make, under his hand and official seal, a certificate setting forth that he has so taken possession, and shall file such certificate in his office, and cause a certified copy thereof to be filed in the office of the prothonotary, who shall index the same in the judgment index under the name of the corporation or person as defendant and the name [fol. 138] of the secretary as plaintiff."

Among the assets of the Trust Company there were two mortgage pools, consisting of groups of mortgages held by the Trust Company as trustee, against which it had issued participation certificates.

The Secretary held possession of these mortgage pools from February 14 to August 25, 1933, when Laura A. Washington, a citizen of the State of Connecticut, and holder of mortgage certificates, filed a bill in equity in one mortgage pool against the Secretary and his deputy as agent in possession of the Trust Company, wherein she alleged that because of the little effort made by the Secretary or his deputy to collect interest and to pay bonds and taxes, irreparable damage to her and other holders of certificates would result unless receivers were appointed, and prayed for the appointment of receivers. A similar bill was filed by Mary A. O'Brien, a citizen of New Jersey, in the other mortgage pool.

On October 29, 1933, two receivers were appointed for each mortgage pool. They were authorized to hold and preserve all the assets, to collect the principal and interest and to make quarterly reports to the court.

The receivers on September 1, 1933, demanded possession from the deputy secretary of banking but this was refused and on the following day on petition the court issued a rule to show cause why the deputy receiver and his two subordinates in charge should not be adjudged in contempt for such refusal. These three persons in each pool appeared before the District Court, filed an answer in the contempt proceedings and moved the court to dismiss the bill and vacate the appointment of receivers. The [fol. 139] court refused the motions, but entered orders amending his decrees, and made the receivers "temporary" rather than permanent. Appeals were taken from the decrees appointing receivers, making them temporary and refusing the motions to dismiss and vacate.

The real question upon which the determination of this case depends is whether or not the filing of the certified copy of the certificate of possession in the prothonotary's office of Chester County conferred jurisdiction on the state court. If it did, this case was erroneously decided, for of two courts, state and federal, having concurrent and coordinate jurisdiction of the subject of an action, that court which first obtains jurisdiction has the right to proceed to its final determination without interference from the other. O'Neil v. Welch, 245 Fed. 261; Harkin et al. v. Brundage, 276 U. S. 36. This principle of law applies not only to actions involving corporations generally, but to those involving quasi public corporations. This we held in the case of Commonwealth of Pennsylvania v. John G. Williams, et al. — Fed. (2d) — (decided July 23, 1934), and it is unnecessary to repeat here what we said there.

The appellants say that "not only has the state officer (Secretary of Banking) long ago taken possession of the assets of the trust company, but the state law has put him in possession as 'receiver' and has subjected him to the jurisdiction of a particular state court," and therefore the United States court could not appoint receivers of the fund already in his possession. They base this contention on Section 701 of the Act of July 3, 1933, which provides that:

"Status of Secretary as Receiver.—Except as otherwise provided in this act, the Secretary when he has taken possession of the business and property of an institution, shall be responsible to the court in which the certificate of pos- [fol. 140] session is filed, and not to any other court. His rights, powers, and duties shall be those of a general receiver appointed by any court in equity in this Commonwealth, except as such rights, powers, and duties are increased or limited by the provisions of this act. He shall be vested, in his official capacity, with all the rights, powers, and duties of such institution; with the title or the right to possession, including debts due, and liens and other security therefor; and with the institution's rights of action or redemption. This shall be so whether such property and debts due, such liens or other security therefor, or such rights of action or redemption, are held in the name of such institution, or in the name of some other corporation or person. He shall have power to execute in his name, as receiver, any instrument incident to the exercise of any

power granted to or any duty imposed upon him as receiver of such institution.

The Secretary shall be the representative of the creditors of the institution and shall be entitled, as such, to have vacated and set aside, for the benefit of the creditors, any judgment, execution, attachment, sequestration, payment, pledge, assignment, transfer, conveyance, or encumbrance, which could have been avoided by any of the creditors, or by which one creditor is given an unlawful preference over another."

This section defines the status of the Secretary as the statutory receiver of the institution and defines his rights, powers and duties. It "subjects" him to the jurisdiction of a particular court, only in the sense that it points out the State court which shall have jurisdiction over him when it is invoked.

Judge Kirkpatrick in commenting on this section of the statute in the case of General Banking Company v. William G. Gordon and John J. Sullivan (decided October 11, 1932) said:

"As to the jurisdictional question raised, I am satisfied that this court has jurisdiction. The Secretary of Banking [fol. 141] is an administrative officer. His office exists by statute. He is appointed by the governor and not by the court. He is not an equity receiver, and the mere fact that the statute provides that he shall have the rights, powers and duties of an equity receiver does not make him one, nor does the fact that the Common Pleas Courts of the state are given jurisdiction to make certain orders and decrees relating to the conduct of the liquidation and the rights in the funds does not mean that the fund is in the custody of the court. That depends entirely upon the nature of the office of the liquidating officer and the power from which he derives his authority."

Upon taking possession of the business and property of the corporation, the Secretary shall forthwith make and file in his office at Harrisburg a certificate that he has taken possession and file a "certified copy thereof" in the office of the prothonotary. Counsel says that "constructive notice to the public is given, not by filing the duplicate certificate with the prothonotary, but by filing the original certificate in the Secretary's Office at Harrisburg. • • •

The duplicate certificate of possession is required to be filed with the prothonotary so that there will be a definite act marking the inception of the court's jurisdiction. It is analogous to the filing of a bill for the appointment of a receiver; though the judges know nothing of the matter, the court has jurisdiction from the moment such a bill is filed". But the statute does not so state.

The indexing of a certified copy of the certificate of possession, when filed in the office of the prothonotary by the Secretary, as plaintiff, in the "judgment index" does not confer upon the court jurisdiction which has not been invoked. The mere filing of a paper which in fact is nothing more than a notice that possession of the property of the corporation has been taken, cannot confer jurisdiction upon the court in the absence of any law to the effect that such [fol. 142] an act constitutes the beginning of legal action rather than the notice of a mere act of a state officer in the performance of his administrative duties. The Secretary, just as any other citizen, may invoke the jurisdiction of the court, but the simple filing of a mere notice of an administrative act does not do so and this seems evident from the terms of the Act. This paper is more particularly a notice to the county in which the corporation is located as distinguished from a notice to the Commonwealth generally when filed in Harrisburg. As Judge Kirkpatrick observed with regard to an "equity receiver" the fact that he is called "plaintiff" in this simple notice does not make him one in a legal action which the paper itself does not in terms, nor by necessary or reasonable implication, purport to institute. It is not analogous to the filing of a bill for a receiver, as stated by counsel, which contains definite allegations invoking the court's jurisdiction and praying for certain definite action of the court. The certificate does nothing of this kind. It is only a notice setting forth that the Secretary has taken possession of the business and property of the corporation, does not invoke the jurisdiction of the court and asks nothing whatever of it. It is rather analogous to the recording of a deed, mortgage or notice of lien.

In addition to filing a certificate of possession in his office in Harrisburg and a certified copy thereof in the office of the prothonotary in the county where the corporation is situated, the Secretary is required to file a certified

copy of the certificate in the office of the recorder of deeds in every county in the Commonwealth where real estate belonging to the corporation is located. The evident purpose of this requirement was to give special notice in these [fol. 143] counties as well as in the county in which the corporation is situated. The filing of certificates in these counties does not give the courts therein jurisdiction though the Secretary may at the proper time invoke their jurisdiction just as he may invoke the jurisdiction of the court in the county where the institution is located, for section 802 B of the Act of 1933 provides that:

"The Secretary may institute any action at law or in equity, or execute and sign any written instruments, which the institution itself could have instituted, executed or signed."

Mortgage pools in an insolvent corporation stand in a different relation to the Secretary from that of the general assets. The pools are trust funds which the corporation controls as a fiduciary. The act does not contemplate that they shall be liquidated with the other assets. Upon determining to liquidate the affairs of the corporation, the Secretary shall forthwith give written notice to all parties interested in any of the funds constituting the mortgage pool, requiring them within thirty days to apply to the proper court or official for the appointment of substituted fiduciaries to take the place of such corporation or person. On the failure or neglect of the parties so notified to make such application within the time designated, or in case the parties in interest can not be notified, the Secretary shall himself apply for such appointment of substituted fiduciaries.

This provision shows beyond question that it was not the intention that the Secretary should liquidate these trust funds. They were to be turned over to the substituted fiduciary appointed by the "proper court or official" who would administer them, while the other assets of the institution are being liquidated by the Secretary. The Act contemplated that the Secretary would not only not liquidate [fol. 144] these funds but that he would not have custody of them except during the short period between the time he took possession and determined to liquidate the institution and could have a substituted fiduciary appointed. It is ap-

parent, from the provisions of the Act that it was never intended that the "court" should have custody of these mortgage pool funds unless its jurisdiction should be invoked, for section 40 (c) provides that when there is no dispute as to the amount or identity of the funds and all parties in interest are sui juris, the Secretary may deliver them directly to the substituted fiduciary. That is, the delivery of the funds by the Secretary may be made without the consent or knowledge of the court. It is evident that these funds were never in the custody of the court and form no part of those assets which are to be liquidated by the Secretary. When he takes possession of the assets of the institution, he thereafter makes an inventory and appraisement of them and the entire liquidation is under the jurisdiction of the court, but the mortgage pools are excluded from this liquidation. These funds are kept separate and apart from the other assets. They do not belong to the depositors, stockholders or creditors, and for this reason the Secretary is required to divest himself of them as soon as he decides to liquidate, and to deliver them to the substituted fiduciary.

The Secretary had no right to the custody of these funds when the bill in this case was filed. He determined to liquidate the assets of the Trust Company on April 3, 1933. It was his duty forthwith to give written notice to all parties interested in these funds requiring them within thirty days to apply to the proper court or official for the appointment of a substituted fiduciary to take the place of the Trust Company and if they failed or neglected to make the ap- [fol. 145] plication within that time, it was his duty to do so. He neither notified the parties in interest nor made the application himself, but did nothing and continued to hold the funds in violation of the statute. If he had performed his duties, as directed by the statute, he would have divested himself of these funds long before the bill was filed. The complainants are not attempting to take the assets of the Trust Company out of his custody or to interfere with the performance of his statutory duty in liquidating them. Consequently the decision in the case of Bank of Bay Biscayne v. Hankins, 42 Fed. (2d) 209 (C. C. A. 5) has no application to the facts in this case. In that case the State Comptroller had taken over the bank and was liquidating the bank and administering its assets as the statu-

tory officer entrusted with these assets for liquidation. The court said: "Whenever the laws of a state provide for supervision and control of the affairs of a bank by an authorized official, and also for the ultimate liquidation and distribution of its assets under his direction, in the event of its insolvency, it is a matter of grave consequence for any court to interfere, and that should be done only in a perfectly clear case." Even there it is recognized that in a proper case the court had power to appoint receivers to liquidate the institution. But here the Secretary may continue to administer the assets of the Trust Company such as were involved there without interference by the receivers appointed in this case.

These mortgage pool funds not being in the possession, actual or constructive, of the court when the bill in this case was filed, the federal court had power to appoint receivers to administer them. They should have been out of the possession of the Secretary before the bill was filed, and whether or not they were thereafter taken out of his possession by the delivery of them to a substituted fiduciary [fol. 146] as the statute provided, or by the appointment of federal receivers, does not affect the performance of his duty in liquidating the Trust Company. The question here is really one of the exercise of discretion.

Appellants allege that this is a suit against the Commonwealth of Pennsylvania and is prohibited by the Eleventh Amendment to the Constitution of the United States.

Under the facts in this case this contention is unsound.

The question remains as to whether or not the learned District Judge, having power to appoint receivers, abused his discretion in doing so.

In his opinion to vacate the appointment of receivers, he said:

"It must be remembered that the Banking Department took charge of the defunct institution on February 14, 1933. Notwithstanding the fact that millions of dollars are concerned, and a large number of certificate holders are involved nothing has been done by the Banking Department to provide the means for an active, intelligent, responsible administration of its pools. Just why such a situation has continued to exist has not been explained. Non-resident

petition-s in this case are dissatisfied with such inaction. In the exercise of their constitutional rights they have appealed to the equity side of this court for relief. They are alarmed over the safety of their holdings. No excuse, no explanation, and no promises of a future policy have been given. No interested group of fellow participants in the pool have entered an appearance or objected as a matter of record. This Court, therefore, feels that it not only has jurisdiction, but that in view of the status of the case its duty as a Chancellor is that that jurisdiction be recognized and that the prayed for relief be granted."

[fol. 147] We cannot say that under all the facts of this case, the District Judge abused his discretion in appointing the receivers and the decrees are affirmed.

A true copy. Teste:
—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 148] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1933

No. 5279

William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy, as Agent in Possession of Chester County Trust Co., Appellants,

v.

Laura A. Washington, Complainant, and Edward W. Wells and Richard F. Ennis, Receivers of Trust Fund Mortgages Aggregating $2,901,236.09, Against Which Certain Certificates Were Issued by Chester County Trust Company, Appellees

Order Affirming Decrees—Filed September 28, 1934

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the

Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decrees of the said District Court in this cause be, and the same are hereby affirmed, with costs.

Philadelphia, September 28, 1934.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 149] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1933

No. 5280

William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy, as Agent in Possession of Chester County Trust Co., Appellants,

v.

Mary A. O'Brien, Complainant, and John Hemphill and J. Louis Breitinger, Receivers of Trust Fund Mortgages Aggregating $1,752,404.91, Against Which Certificates Were Issued by Chester County Trust Company, Appellees

Order Affirming Decrees—Filed September 28, 1934

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decrees of the said District Court in this cause be, and the same are hereby affirmed, with costs.

Philadelphia, September 28, 1934.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 150] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 151] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1934

No. 549

ORDER ALLOWING CERTIORARI—Filed January 7, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 152] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1934

No. 550

ORDER ALLOWING CERTIORARI—Filed January 7, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed of cover: File Nos. 39,177, 39,178. U. S. Circuit Court of Appeals, Third Circuit. Term No. 549. William D. Gordon, Secretary of Banking, et al., etc., Petitioners, vs. Laura A. Washington et al., etc. Term No. 550. William D. Gordon, Secretary of Banking, et al., etc., Petitioners, vs. Mary A. O'Brien et al., etc. Petitions for writs of certiorari and exhibit thereto. Filed November 28, 1934. File Nos. 549, O. T., 1934; 550, O. T., 1934.

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IN THE

Supreme Court of the United States.

Term, 1934. No. .

WILLIAM D. GORDON, SECRETARY OF BANKING, AND ROBERT G. FUNKHOUSER, SPECIAL DEPUTY AS AGENT IN POSSESSION OF CHESTER COUNTY TRUST COMPANY,
Petitioners,

v.

LAURA A. WASHINGTON, COMPLAINANT, AND EDWARD WELLS AND RICHARD F. ENNIS, RECEIVERS OF TRUST FUND MORTGAGES AGGREGATING $2,901,236.01,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania and of Robert G. Funkhouser, respectfully represents:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED.

(a) The Decrees Below.

Your petitioners are the Secretary of Banking of the Commonwealth of Pennsylvania, receiver of Chester County Trust Company, and Robert G. Funkhouser, his deputy receiver.

The decree which your petitioners seek to have this court review is a final decree of the United States Circuit Court of Appeals for the Third Circuit, entered September 28, 1934, affirming the decree of the United States District Court for the Eastern District of Pennsylvania entered August 30, 1933, appointing receivers, the decree of the District Court entered September 22, 1933, changing the designation of the appointees to "temporary receivers", and the decree of the District Court entered October 4, 1933, dismissing the defendants' petition to vacate the appointment of receivers and overruling the defendants' motion to dismiss the bill of complaint. All of these decrees were in a suit entitled and numbered on the docket of the District Court, Laura A. Washington v. William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in possession of Chester County Trust Company, June Term, 1933, No. 7845. The suit was in equity and sought the appointment of receivers "to take charge of, conserve and administer all of the assets comprising" a mortgage trust fund formerly conducted by Chester County Trust Company and since its closing conducted by the Secretary of Banking of Pennsylvania as receiver of the trust company.

The Secretary of Banking contends that the decree of the District Court and the decree of the Circuit Court of Appeals affirming it are erroneous because (1) they seek to divest the Commonwealth of Pennsylvania of the administration of trust assets assumed before the institution of this proceeding under express statutory authority conferred on its Secretary of Banking and its courts; and (2) the District Court has appointed trustees, in the guise of receivers, in pursuance of a bill which discloses no neces-

sity for a receiver, without waiting for an answer to be filed, without ascertainment of the facts, and without notice to any party in interest except the plaintiff.

(b) The Questions Presented.

The questions presented to the Circuit Court of Appeals for the Third Circuit on the appeal of the Secretary of Banking from the decree of the District Court and the questions for review before this court are:

1. The Secretary of Banking became the receiver of a closed trust company in accordance with express statutory authority and took possession of a mortgage trust fund formerly conducted by it. Pending the delivery of the trust fund to a new trustee appointed by the court of common pleas as directed by the statute, can a Federal court divest the Commonwealth of its possession and control, by the appointment of receivers?

2. When the Secretary of Banking takes possession of the business and property of a bank and files with the court of common pleas a certified copy of his certificate of possession, does he become subject to the jurisdiction of that court as provided by the statute, or must the court enter a formal decree with respect to each asset before it is brought within its jurisdiction?

3. Is the appointment of receivers to wrest possession and control of a mortgage trust fund from the Commonwealth of Pennsylvania, a violation of the Eleventh Amendment to the Constitution of the United States.

4. Did the District Court abuse its discretion by hastily appointing trustees of a mortgage trust fund in the guise

of receivers, upon a bill which shows no need for receivers, without waiting for an answer to be filed to the bill, without ascertaining the facts, and without notice to the parties in interest?

(c) The Statutes Involved.

Challenge of the jurisdiction of the Federal court in this case involves Section 24 of the Judicial Code, as amended (R. S. Secs. 563, 629; 28 U. S. C. A. Sec. 41 (1)).

The right of the Commonwealth of Pennsylvania to control exclusively through its Secretary of Banking and its courts a mortgage trust fund formerly conducted by a trust company now closed, is given by the Pennsylvania Act of Assembly of May 15, 1933, P. L. 565, called The Department of Banking Code. Pertinent sections of this act are set forth at page 35 in the Appendix to the brief.

(d) Statement of Facts.

1. On February 14, 1933, the Secretary of Banking of the Commonwealth of Pennsylvania took "possession of the business and property" of the Chester County Trust Company, located in West Chester, Chester County, Pennsylvania. He filed a certificate of possession in his office at Harrisburg, and on February 15th filed a certified copy of that certificate in the office of the prothonotary of Chester County who indexed it in the judgment index. All of this was in accordance with the requirements of the Act of June 15, 1923, P. L. 809, known as The Banking Act 1923. (R. 137.)

2. The Secretary of Banking then entered on his duties as a receiver under the jurisdiction of the Court of Common Pleas of Chester County, as provided by The Banking

Act of 1923. Among the "business and property" of which the Secretary took possession was a trust fund, consisting of a group of mortgages held by the trust company as a trustee, against which it had issued participation certificates. The face value of this pool was $1,742,404.91. (R. 138.)

3. On July 3, 1933, the Act of May 15, 1933, P. L. 565, known as The Department of Banking Code became effective, repealing the Banking Act of 1923. This code recited the duties of the Secretary of Banking as a receiver of closed institutions and particularly described his duties and the rights of interested parties with respect to mortgage trust funds or pools. The text of the sections dealing with mortgage trust funds or pools is set forth at page 39 in the Appendix to our brief. This act provides in section 701:

> "Except as otherwise provided in this act, the Secretary, when he has taken possession of the business and property of an institution, shall be responsible to the court in which the certificate of possession is filed, and not to any other court."

4. The Secretary of Banking in pursuance, first of The Banking Act of 1923, and then of the Department of Banking Code, has conducted the mortgage trust fund from February 14, 1933, when he took possession of the trust company, to the present.

5. On August 25, 1933, a bill was filed in the District Court of the United States for the Eastern District of Pennsylvania, in behalf of Laura A. Washington, a citizen of Connecticut, naming as defendants "William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust

Company". The bill stated that the plaintiff owned an interest in the mortgage trust fund (which interest was about one-fifth of one per cent. thereof). The only complaints were that "little effort is made to secure the collection of interest", that "little effort is being made to compel the payment of taxes", and that unless a receiver is appointed "the interest on said mortgages will continue in default and the taxes on many of the properties will continue to remain unpaid to the detriment and irreparable damage of the complainant and others holding like certificates". There was no charge of improper conduct or of mismanagement. The bill prayed for the appointment of a receiver of the pool, for an order on the defendants to turn over all the assets and records of the pool to the receiver, and for authority to the receiver to collect mortgage interest, to demand the payment of taxes and to bring suit for the collection of principal. (R. 9.)

6. On August 28 the plaintiff's attorney filed a motion for the appointment of a receiver. (R. 1.) On August 29, 1933, the subpœna was served on the defendants. (R. 2.)

7. On August 30, 1933, one hour after telephone notice to the defendants' counsel, Judge Welsh held a hearing on the motion. He refused to give the defendants' counsel opportunity for further consideration, and upon his offer to submit a brief stated that no brief was necessary. On the same day, without waiting for an answer to be filed, without taking testimony, and without any notice to those interested in the trust fund other than the plaintiff, Judge Welsh appointed two "receivers" of the assets of the trust. (R. 49.) The order directed the receivers "to hold and preserve" all the assets and to "make quarterly reports to this court". It authorized the receivers to collect principal and interest by suit or otherwise, to employ agents

and to pay out money for the preservation of the assets. (R. 15.)

8. On September 1, 1933, the two receivers with two other receivers, named under similar circumstances for another mortgage trust fund of the same trust company, accompanied by two attorneys, appeared at the office maintained by the Secretary of Banking as receiver of the trust company and demanded possession of all assets and records of the trust. Possession was refused by two subordinates then on duty. (R. 49.) The proceedings in the other mortgage trust fund just referred to are the subject of a petition for certiorari now before this Court.

9. On September 2, 1933, the Saturday before Labor Day, Judge Welsh, on petition by his receivers, allowed a rule to show cause why the deputy receiver and his subordinates should not be adjudged in contempt. (R. 24.)

10. On September 4, 1933, on a bill of complaint filed by a mortgage trust fund certificate holder, the Court of Common Pleas of Chester County ordered an injunction to issue restraining your petitioners from delivering any assets or records of the trust fund to any persons appointed receivers by the United States District Court, pending further order from the Court of Common Pleas of Chester County. (R. 32.) This injunction was issued and served on the deputy receiver. (R. 31.)

11. On September 5, 1933, the three persons named in the contempt proceedings appeared before Judge Welsh. There were filed then an answer to the contempt petition (R. 29), a motion to dismiss the bill (43) and a petition to vacate the appointment of the receivers (46). No further steps have been taken in the contempt proceedings.

12. On September 22, 1933, Judge Welsh of his own motion entered a decree amending the former decree so as to make his appointees "temporary receivers" (R. 55) and caused the original decree to be altered by inserting the word "temporary" throughout with pen and ink. (R. 15.)

13. On October 4, 1933, Judge Welsh filed an opinion (R. 66) and a decree (R. 73) dismissing the prayer to vacate and overruling the motion to dismiss.

14. Judge Welsh refused to allow an appeal and a supersedeas (R. 76), and these were allowed by the Circuit Court of Appeals for the Third Circuit (R. 87).

15. On January 4, 1934, the Circuit Court of Appeals heard argument on the appeal. At the argument the owners of $1,716,684.70 of the trust fund filed a petition for leave to intervene and stated their active opposition to a Federal receivership (R. 103). No other certificate holder has been made a party to this proceeding or has appeared in it. On September 28, 1934, the Circuit Court of Appeals filed an opinion (R. 136) and entered an order (R. 149) affirming the decrees of the District Court.

(e) Rulings of the Court Below.

In affirming the decrees of the District Court appointing receivers, later appointing temporary receivers, dismissing the petition to vacate the order appointing receivers and overruling the motion to dismiss the bill, the Circuit Court of Appeals for the Third Circuit ruled:

(1) That the District Court could appoint temporary receivers of a mortgage trust fund to replace the Secretary of Banking, pending the appointment of a substituted trustee by the Court of Common Pleas.

(2) That the Court of Common Pleas of Chester County had not acquired jurisdiction of all the assets held by the Secretary of Banking as receiver.

(3) That the District Court had not violated the Eleventh Amendment to the Constitution of the United States.

(4) That the District Court had not abused its discretion in appointing the receivers.

B. REASONS FOR GRANTING THE PETITION.

1. The decision of the Circuit Court of Appeals for the Third Circuit is in direct conflict with the decisions of other circuits the review of which has been refused by this Court. It has not differentiated between receivership proceedings affecting assets of the ordinary business or commercial corporation and those of a quasi-public corporation.

Amos v. Trust Co., of Florida, 54 F. (2d) 286 (1931) C. C. A. Fifth Circuit. Certiorari refused. 285 U. S. 559.

Mitchell v. Lay, 48 F. (2d) 79 (1930) C. C. A. Ninth Circuit. Certiorari refused. 283 U. S. 864.

2. The decision of the Circuit Court of Appeals is opposed to the public policy of the Commonwealth of Pennsylvania and is in direct conflict with the decision of its Supreme Court to the effect that a Federal court has no jurisdiction to appoint receivers to interfere with the liquidation of the business of a quasi-public corporation chartered, supervised and regulated by the state.

Commonwealth v. Penn General Casualty Co., 316 Pa. 1 (1934).

3. The Circuit Court of Appeals has upheld the District Court in making available the remedy of a receivership as a weapon of coercion and a means for the frustration of the public policy of the state as expressed in its statutes and universally followed in every other case in the state:

Shapiro v. Wilgus, 287 U. S. 348 (1932).

4. From the time the Commonwealth of Pennsylvania first established its system for the regulation, supervision and liquidation by the Department of Banking of its banks and building and loan associations until the decision in *Commonwealth of Pennsylvania v. John G. Williams et al., Receivers of Mortgage Building and Loan Association* (certiorari allowed October 22, 1934; October Term, 1934, No. 394) it had been generally understood and believed throughout the Commonwealth that quasi-public institutions chartered by the state were not subject to the equity jurisdiction of the Federal courts. Certainly before the instant case the appointment of Federal receivers for assets in the hands of the Secretary of Banking as the statutory receiver of a closed state trust company was altogether unheard of and not considered to be within the bounds of possibility.

5. The Circuit Court of Appeals has sustained the action of the District Court which attempts to deprive the Commonwealth of Pennsylvania of its sole control of property exercised under state law through its authorized administrative officer and under the supervision of its courts, for months before the bill was filed in the Federal court.

6. The assumption of jurisdiction by the District Court under circumstances plainly showing anxiety on the part of the appointing judge to oust the state officer for the sole

purpose of seating the court's nominees, creates in the Commonwealth of Pennsylvania for the first time an impossible situation. If the decision of the Circuit Court of Appeals is not reversed, no function of the Secretary of Banking exercised by virtue of state law, no asset of a state quasi-public institution entrusted by state law to him or to any other statutory officer, and no trust fund in the hands of such officer or of any private person occupying the position of a fiduciary and accountable to state courts, will be safe from Federal receivership proceedings.

7. The jurisdictional question involved concerns an unnecessary and unjustified interference with the sovereign rights of a state, and is in that respect akin to the questions involved in two other cases in each of which a writ of certiorari has been allowed by this Court.

Commonwealth of Pennsylvania v. John G. Williams et al., October Term, 1934, No. 394.
Gordon, Secretary of Banking, v. Joseph Ominsky et al., October Term, 1934, No. 395.

8. The jurisdictional question is of paramount public importance. It involves a contest between the powers of the Federal court and the powers of a state exercised through its courts, and its Secretary of Banking. In this case each court by affirmative decree has claimed jurisdiction of the property in controversy.

9. Contrary to the express provisions of the Eleventh Amendment, the District Court has construed its power to extend to a proceeding against a state, has interfered with a state officer in the discharge of his statutory duty and has employed contempt proceedings against that officer's subordinates.

10. The District Court judge abused his discretion and violated fundamental principles of equity by appointing trustees, under the guise of "temporary receivers," without allowing an answer to be filed, without ascertaining the facts, without giving notice to the parties in interest, and upon averments plainly insufficient to justify the appointment of receivers.

11. The courts below have decided an important question of general law in a way that is untenable. It is imperative that this Court promptly and finally settle a conflict existing between the jurisdictions asserted by the state and Federal courts. This settlement is necessary in order (a) that there may be effective and unhampered administration of the banking, building and loan association and insurance laws not only of Pennsylvania but of all other states which have set up systems for the governance of corporations subject to similar laws; and (b) that protection may be afforded to every kind of trust, no matter who are the trustees, from those who will seek from the Federal courts the appointment of trustees, under the guise of receivers, but without the safeguards attending the appointment of trustees by the state courts which alone should have jurisdiction over such trusts. The Circuit Court of Appeals has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

C. PRAYER FOR WRIT OF CERTIORARI.

Wherefore your petitioners respectfully pray:

(a) That a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that court to certify and to send to this Court on a day certain to be thereafter designated, a full, true and complete transcript of the record and of all the proceedings in said Circuit Court of Appeals in the cause therein entitled "William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company v. Laura A. Washington, Complainant, and Edward W. Wells and Richard F. Ennis, Receivers of Trust Fund Mortgages Aggregating $2,901,-236.01 Against Which Certificates Were Issued by Chester County Trust Company," to the end that the said cause may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled "An act to establish a Circuit Court of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, c. 517 (26 Stat. 826-828), amended by the Act of February 13, 1925, c. 229 (43 Stat. 938, 28 USCA 347).

(b) That such remedy in the premises be decreed as to this Court may seem appropriate and in conformity with said act; that the decrees of the United States Circuit Court of Appeals for the Third Circuit in said cause, and of the District Court of the United States for the Eastern District of Pennsylvania, and each and every part thereof may be reversed by this Court, and said courts below directed to dismiss the bill in equity and to vacate

the decree appointing Edward W. Wells and Richard F. Ennis, temporary receivers of the mortgage trust fund or pool formerly conducted by the Chester County Trust Company and now conducted by the Secretary of Banking of the Commonwealth of Pennsylvania.

(c) That this Court may make such further order and direction in the premises as may be in accordance with the law to be applied to the facts in this case.

And your petitioners will ever pray, etc.

WILLIAM D. GORDON,
Secretary of Banking of the Commonwealth of Pennsylvania.

ROBERT G. FUNKHOUSER,
Special Deputy as Agent in Possession of Chester County Trust Company.

WM. A. SCHNADER,
Attorney General,
Commonwealth of Pennsylvania.

HAROLD D. SAYLOR,
Deputy Attorney General.

SHIPPEN LEWIS,
Special Deputy Attorney General.

JOSEPH K. WILLING,
Special Attorney.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

WILLIAM D. GORDON, being first duly sworn, says that he is the Secretary of Banking of the Commonwealth of Pennsylvania, that he has read the foregoing petition and knows the contents thereof, and that the facts stated therein of his own knowledge are true, and the facts stated on information received from others are averred on information received from reliable sources and he verily believes them to be true; and that as Secretary of Banking he is duly authorized to file this petition and apply for a writ of certiorari as therein prayed for.

WILLIAM D. GORDON.

Sworn to and subscribed before me this twenty-third day of November, 1934.

ANNA M. DORNAN,
Notary Public.
My commission expires April 1, 1935.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The court is respectfully referred to the brief in support of the petition for certiorari in William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company, Petitioners, v. Mary A. O'Brien, Complainant, and John Hemphill and J. Louis Breitinger, Receivers of Trust Fund Mortgages Aggregating $1,742,404.91, Respondents. The stipulation of counsel (R. 4) shows that the facts of the two cases are substantially the same. Each of the lower courts has filed one opinion covering both cases.

At the argument of the present case before the Circuit Court of Appeals, a petition for leave to intervene was filed by the owners of $1,716,684.70 of the trust fund, stating their active opposition to a Federal receivership.

Respectfully submitted,

WILLIAM A. SCHNADER,
Attorney General,
Commonwealth of Pennsylvania.
HAROLD D. SAYLOR,
Deputy Attorney General.
SHIPPEN LEWIS,
Special Deputy Attorney General.
JOSEPH K. WILLING,
Special Attorney,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States.

Term, 1934. No.

WILLIAM D. GORDON, SECRETARY OF BANKING, AND ROBERT G. FUNKHOUSER, SPECIAL DEPUTY AS AGENT IN POSSESSION OF CHESTER COUNTY TRUST COMPANY,
Petitioners,

v.

MARY A. O'BRIEN, COMPLAINANT, AND JOHN HEMPHILL AND J. LOUIS BREITINGER, RECEIVERS OF TRUST FUND MORTGAGES AGGREGATING $1,742,404.91.
Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania and of Robert G. Funkhouser, respectfully represents:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED.

(a) The Decrees Below.

Your petitioners are the Secretary of Banking of the Commonwealth of Pennsylvania, receiver of Chester County Trust Company, and Robert G. Funkhouser, his deputy receiver.

The decree which your petitioners seek to have this court review is a final decree of the United States Circuit Court of Appeals for the Third Circuit, entered September 28, 1934, affirming the decree of the United States District Court for the Eastern District of Pennsylvania entered August 30, 1933, appointing receivers, the decree of the District Court entered September 22, 1933, changing the designation of the appointees to "temporary receivers", and the decree of the District Court entered October 4, 1933, dismissing the defendants' petition to vacate the appointment of receivers and overruling the defendants' motion to dismiss the bill of complaint. All of these decrees were in a suit entitled and numbered on the docket of the District Court, Mary A. O'Brien v. William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in possession of Chester County Trust Company, June Term, 1933, No. 7849. The suit was in equity and sought the appointment of receivers "to take charge of, conserve and administer all of the assets comprising" a mortgage trust fund formerly conducted by Chester County Trust Company and since its closing conducted by the Secretary of Banking of Pennsylvania as receiver of the trust company.

The Secretary of Banking contends that the decree of the District Court and the decree of the Circuit Court of Appeals affirming it are erroneous because (1) they seek to divest the Commonwealth of Pennsylvania of the administration of trust assets assumed before the institution of this proceeding under express statutory authority conferred on its Secretary of Banking and its courts; and (2) the District Court has appointed trustees, in the guise of receivers, in pursuance of a bill which discloses no neces-

sity for a receiver, without waiting for an answer to be filed, without ascertainment of the facts, and without notice to any party in interest except the plaintiff.

(b) The Questions Presented.

The questions presented to the Circuit Court of Appeals for the Third Circuit on the appeal of the Secretary of Banking from the decree of the District Court and the questions for review before this court are:

1. The Secretary of Banking became the receiver of a closed trust company in accordance with express statutory authority and took possession of a mortgage trust fund formerly conducted by it. Pending the delivery of the trust fund to a new trustee appointed by the court of common pleas as directed by the statute, can a Federal court divest the Commonwealth of its possession and control, by the appointment of receivers?

2. When the Secretary of Banking takes possession of the business and property of a bank and files with the court of common pleas a certified copy of his certificate of possession, does he become subject to the jurisdiction of that court as provided by the statute, or must the court enter a formal decree with respect to each asset before it is brought within its jurisdiction?

3. Is the appointment of receivers to wrest possession and control of a mortgage trust fund from the Commonwealth of Pennsylvania, a violation of the Eleventh Amendment to the Constitution of the United States.

4. Did the District Court abuse its discretion by hastily appointing trustees of a mortgage trust fund in the guise

of receivers, upon a bill which shows no need for receivers, without waiting for an answer to be filed to the bill, without ascertaining the facts, and without notice to the parties in interest?

(c) The Statutes Involved.

Challenge of the jurisdiction of the Federal court in this case involves Section 24 of the Judicial Code, as amended (R. S. Secs. 563, 629; 28 U. S. C. A. Sec. 41 (1)).

The right of the Commonwealth of Pennsylvania to control exclusively through its Secretary of Banking and its courts a mortgage trust fund formerly conducted by a trust company now closed, is given by the Pennsylvania Act of Assembly of May 15, 1933, P. L. 565, called The Department of Banking Code. Pertinent sections of this act are set forth at page 35 in the Appendix to the brief.

(d) Statement of Facts.

1. On February 14, 1933, the Secretary of Banking of the Commonwealth of Pennsylvania took "possession of the business and property" of the Chester County Trust Company, located in West Chester, Chester County, Pennsylvania. He filed a certificate of possession in his office at Harrisburg, and on February 15th filed a certified copy of that certificate in the office of the prothonotary of Chester County who indexed it in the judgment index. All of this was in accordance with the requirements of the Act of June 15, 1923, P. L. 809, known as The Banking Act 1923. (R. 137.)

2. The Secretary of Banking then entered on his duties as a receiver under the jurisdiction of the Court of Common Pleas of Chester County, as provided by The Banking

Act of 1923. Among the "business and property" of which the Secretary took possession was a trust fund, consisting of a group of mortgages held by the trust company as a trustee, against which it had issued participation certificates. The face value of this pool was $1,742,404.91. (R. 138.)

3. On July 3, 1933, the Act of May 15, 1933, P. L. 565, known as The Department of Banking Code became effective, repealing the Banking Act of 1923. This code recited the duties of the Secretary of Banking as a receiver of closed institutions and particularly described his duties and the rights of interested parties with respect to mortgage trust funds or pools. The text of the sections dealing with mortgage trust funds or pools is set forth at page 39 in the Appendix to our brief. This act provides in section 701:

> "Except as otherwise provided in this act, the Secretary, when he has taken possession of the business and property of an institution, shall be responsible to the court in which the certificate of possession is filed, and not to any other court."

4. The Secretary of Banking in pursuance, first of The Banking Act of 1923, and then of the Department of Banking Code, has conducted the mortgage trust fund from February 14, 1933, when he took possession of the trust company, to the present.

5. On August 28, 1933, a bill was filed in the District Court of the United States for the Eastern District of Pennsylvania, in behalf of Mary A. O'Brien, a citizen of New Jersey, naming as defendants "William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust

Company". The bill stated that the plaintiff owned an interest in the mortgage trust fund (which interest was about one-fifth of one per cent. thereof). The only complaints were that "little effort is made to secure the collection of interest", that "little effort is being made to compel the payment of taxes", and that unless a receiver is appointed "the interest on said mortgages will continue in default and the taxes on many of the properties will continue to remain unpaid to the detriment and irreparable damage of the complainant and others holding like certificates". There was no charge of improper conduct or of mismanagement. The bill prayed for the appointment of a receiver of the pool, for an order on the defendants to turn over all the assets and records of the pool to the receiver, and for authority to the receiver to collect mortgage interest, to demand the payment of taxes and to bring suit for the collection of principal. (R. 9.)

6. On August 28 the plaintiff's attorney filed a motion for the appointment of a receiver. (R. 6.) On August 29, 1933, the subpœna was served on the defendants. (R. 7.)

7. On August 30, 1933, one hour after telephone notice to the defendants' counsel, Judge Welsh held a hearing on the motion. He refused to give the defendants' counsel opportunity for further consideration, and upon his offer to submit a brief stated that no brief was necessary. On the same day, without waiting for an answer to be filed, without taking testimony, and without any notice to those interested in the trust fund other than the plaintiff, Judge Welsh appointed two "receivers" of the assets of the trust. (R. 49.) The order directed the receivers "to hold and preserve" all the assets and to "make quarterly reports to this court". It authorized the receivers to collect principal and interest by suit or otherwise, to employ agents

and to pay out money for the preservation of the assets. (R. 15.)

8. On September 1, 1933, the two receivers with two other receivers, named under similar circumstances for another mortgage trust fund of the same trust company, accompanied by two attorneys, appeared at the office maintained by the Secretary of Banking as receiver of the trust company and demanded possession of all assets and records of the trust. Possession was refused by two subordinates then on duty. (R. 49.) The proceedings in the other mortgage trust fund just referred to are the subject of a petition for certiorari now before this Court.

9. On September 2, 1933, the Saturday before Labor Day, Judge Welsh, on petition by his receivers, allowed a rule to show cause why the deputy receiver and his subordinates should not be adjudged in contempt. (R. 24.)

10. On September 4, 1933, on a bill of complaint filed by a mortgage trust fund certificate holder, the Court of Common Pleas of Chester County ordered an injunction to issue restraining your petitioners from delivering any assets or records of the trust fund to any persons appointed receivers by the United States District Court, pending further order from the Court of Common Pleas of Chester County. (R. 32.) This injunction was issued and served on the deputy receiver. (R. 31.)

11. On September 5, 1933, the three persons named in the contempt proceedings appeared before Judge Welsh. There were filed then an answer to the contempt petition (R. 29), a motion to dismiss the bill (43) and a petition to vacate the appointment of the receivers (46). No further steps have been taken in the contempt proceedings.

12. On September 22, 1933, Judge Welsh of his own motion entered a decree amending the former decree so as to make his appointees "temporary receivers" (R. 55) and caused the original decree to be altered by inserting the word "temporary" throughout with pen and ink. (R. 15.)

13. On October 4, 1933, Judge Welsh filed an opinion (R. 66) and a decree (R. 73) dismissing the prayer to vacate and overruling the motion to dismiss.

14. Judge Welsh refused to allow an appeal and a supersedeas (R. 76), and these were allowed by the Circuit Court of Appeals for the Third Circuit (R. 87).

15. On January 4, 1934, the Circuit Court of Appeals heard argument on the appeal. At the argument the owners of $326,250 of certificates filed a petition for leave to intervene and stated their active opposition to a Federal receivership (R. 122). No other certificate holder has been made a party to this proceeding or has appeared in it. On September 28, 1934, the Circuit Court of Appeals filed an opinion (R. 136) and entered an order (R. 149) affirming the decrees of the District Court.

(e) Rulings of the Court Below.

In affirming the decrees of the District Court appointing receivers, later appointing temporary receivers, dismissing the petition to vacate the order appointing receivers and overruling the motion to dismiss the bill, the Circuit Court of Appeals for the Third Circuit ruled:

> (1) That the District Court could appoint temporary receivers of a mortgage trust fund to replace the Secretary of Banking, pending the appointment of a substituted trustee by the Court of Common Pleas.

(2) That the Court of Common Pleas of Chester County had not acquired jurisdiction of all the assets held by the Secretary of Banking as receiver.

(3) That the District Court had not violated the Eleventh Amendment to the Constitution of the United States.

(4) That the District Court had not abused its discretion in appointing the receivers.

B. REASONS FOR GRANTING THE PETITION.

1. The decision of the Circuit Court of Appeals for the Third Circuit is in direct conflict with the decisions of other circuits the review of which has been refused by this Court. It has not differentiated between receivership proceedings affecting assets of the ordinary business or commercial corporation and those of a quasi-public corporation.

Amos v. Trust Co., of Florida, 54 F. (2d) 286 (1931) C. C. A. Fifth Circuit. Certiorari refused. 285 U. S. 559.

Mitchell v. Lay, 48 F. (2d) 79 (1930) C. C. A. Ninth Circuit. Certiorari refused. 283 U. S. 864.

2. The decision of the Circuit Court of Appeals is opposed to the public policy of the Commonwealth of Pennsylvania and is in direct conflict with the decision of its Supreme Court to the effect that a Federal court has no jurisdiction to appoint receivers to interfere with the liquidation of the business of a quasi-public corporation chartered, supervised and regulated by the state.

Commonwealth v. Penn General Casualty Co., 316 Pa. 1 (1934).

3. The Circuit Court of Appeals has upheld the District Court in making available the remedy of a receivership as a weapon of coercion and a means for the frustration of the public policy of the state as expressed in its statutes and universally followed in every other case in the state:

Shapiro v. Wilgus, 287 U. S. 348 (1932).

4. From the time the Commonwealth of Pennsylvania first established its system for the regulation, supervision and liquidation by the Department of Banking of its banks and building and loan associations until the decision in *Commonwealth of Pennsylvania v. John G. Williams et al., Receivers of Mortgage Building and Loan Association* (certiorari allowed October 22, 1934; October Term, 1934, No. 394) it had been generally understood and believed throughout the Commonwealth that quasi-public institutions chartered by the state were not subject to the equity jurisdiction of the Federal courts. Certainly before the instant case the appointment of Federal receivers for assets in the hands of the Secretary of Banking as the statutory receiver of a closed state trust company was altogether unheard of and not considered to be within the bounds of possibility.

5. The Circuit Court of Appeals has sustained the action of the District Court which attempts to deprive the Commonwealth of Pennsylvania of its sole control of property exercised under state law through its authorized administrative officer and under the supervision of its courts, for months before the bill was filed in the Federal court.

6. The assumption of jurisdiction by the District Court under circumstances plainly showing anxiety on the part of the appointing judge to oust the state officer for the sole

purpose of seating the court's nominees, creates in the Commonwealth of Pennsylvania for the first time an impossible situation. If the decision of the Circuit Court of Appeals is not reversed, no function of the Secretary of Banking exercised by virtue of state law, no asset of a state quasi-public institution entrusted by state law to him or to any other statutory officer, and no trust fund in the hands of such officer or of any private person occupying the position of a fiduciary and accountable to state courts, will be safe from Federal receivership proceedings.

7. The jurisdictional question involved concerns an unnecessary and unjustified interference with the sovereign rights of a state, and is in that respect akin to the questions involved in two other cases in each of which a writ of certiorari has been allowed by this Court.

Commonwealth of Pennsylvania v. John G. Williams et al., October Term, 1934, No. 394.
Gordon, Secretary of Banking, v. Joseph Ominsky et al., October Term, 1934, No. 395.

8. The jurisdictional question is of paramount public importance. It involves a contest between the powers of the Federal court and the powers of a state exercised through its courts, and its Secretary of Banking. In this case each court by affirmative decree has claimed jurisdiction of the property in controversy.

9. Contrary to the express provisions of the Eleventh Amendment, the District Court has construed its power to extend to a proceeding against a state, has interfered with a state officer in the discharge of his statutory duty and has employed contempt proceedings against that officer's subordinates.

10. The District Court judge abused his discretion and violated fundamental principles of equity by appointing trustees, under the guise of "temporary receivers," without allowing an answer to be filed, without ascertaining the facts, without giving notice to the parties in interest, and upon averments plainly insufficient to justify the appointment of receivers.

11. The courts below have decided an important question of general law in a way that is untenable. It is imperative that this Court promptly and finally settle a conflict existing between the jurisdictions asserted by the state and Federal courts. This settlement is necessary in order (a) that there may be effective and unhampered administration of the banking, building and loan association and insurance laws not only of Pennsylvania but of all other states which have set up systems for the governance of corporations subject to similar laws; and (b) that protection may be afforded to every kind of trust, no matter who are the trustees, from those who will seek from the Federal courts the appointment of trustees, under the guise of receivers, but without the safeguards attending the appointment of trustees by the state courts which alone should have jurisdiction over such trusts. The Circuit Court of Appeals has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

C. PRAYER FOR WRIT OF CERTIORARI.

Wherefore your petitioners respectfully pray:

(a) That a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that court to certify and to send to this Court on a day certain to be thereafter designated, a full, true and complete transcript of the record and of all the proceedings in said Circuit Court of Appeals in the cause therein entitled "William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company v. Mary A. O'Brien, Complainant, and John Hemphill and J. Louis Breitinger, Receivers of Trust Fund Mortgages Aggregating $1,742,404.91 Against Which Certificates Were Issued by Chester County Trust Company," to the end that the said cause may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled "An act to establish a Circuit Court of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, c. 517 (26 Stat. 826-828), amended by the Act of February 13, 1925, c. 229 (43 Stat. 938, 28 USCA 347).

(b) That such remedy in the premises be decreed as to this Court may seem appropriate and in conformity with said act; that the decrees of the United States Circuit Court of Appeals for the Third Circuit in said cause, and of the District Court of the United States for the Eastern District of Pennsylvania, and each and every part thereof may be reversed by this Court, and said courts below directed to dismiss the bill in equity and to vacate

the decree appointing John Hemphill and J. Louis Breitinger, temporary receivers of the mortgage trust fund or pool formerly conducted by the Chester County Trust Company and now conducted by the Secretary of Banking of the Commonwealth of Pennsylvania.

(c) That this Court may make such further order and direction in the premises as may be in accordance with the law to be applied to the facts in this case.

And your petitioners will ever pray, etc.

WILLIAM D. GORDON,
Secretary of Banking of the Commonwealth of Pennsylvania.

ROBERT G. FUNKHOUSER,
Special Deputy as Agent in Possession of Chester County Trust Company.

WM. A. SCHNADER,
Attorney General,
Commonwealth of Pennsylvania.

HAROLD D. SAYLOR,
Deputy Attorney General.

SHIPPEN LEWIS,
Special Deputy Attorney General.

JOSEPH K. WILLING,
Special Attorney.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

WILLIAM D. GORDON, being first duly sworn, says that he is the Secretary of Banking of the Commonwealth of Pennsylvania, that he has read the foregoing petition and knows the contents thereof, and that the facts stated therein of his own knowledge are true, and the facts stated on information received from others are averred on information received from reliable sources and he verily believes them to be true; and that as Secretary of Banking he is duly authorized to file this petition and apply for a writ of certiorari as therein prayed for.

WILLIAM D. GORDON.

Sworn to and subscribed before me this twenty-third day of November, 1934.

ANNA M. DORNAN,
Notary Public.
My commission expires April 1, 1935.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I. THE OPINIONS OF THE COURTS BELOW.

The opinions of the District Court and of the Circuit Court of Appeals have not been reported.

II. THE JURISDICTION.

(a) The jurisdiction of this court is invoked under Sec. 240 of the Judicial Code, as amended by the act of February 13, 1925, c. 229, Sec. 1 (43 Stat. 938; 28 USCA 347) on the ground that the Circuit Court of Appeals has decided an important question of general law in conflict with the decision of the highest court of the Commonwealth of Pennsylvania, and has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

(b) The decree to be reviewed is the decree of the United States Circuit Court of Appeals for the Third Circuit, entered September 28, 1934 (R. 149) affirming the decree of the District Court for the Eastern District of Pennsylvania entered August 30, 1933, appointing receivers (R. 15), the decree entered September 22, 1933, changing the designation of receivers to "temporary receivers" (R. 55), and the decree entered October 4, 1933, dismissing the prayer to vacate the appointment of receivers and overruling the motion to dismiss the bill (R. 73).

(c) The specific claims advanced and rulings made in the lower court were:

(1) The defendants claimed that the District Court cannot appoint receivers of a mortgage trust fund in lieu of the Secretary of Banking pending the appointment of a

substituted trustee by the court of common pleas. The Circuit Court has ruled that the District Court can appoint such receivers.

(2) The defendants claimed that the Court of Common Pleas of Chester County had acquired jurisdiction of all the assets held by the Secretary of Banking as receiver. The Circuit Court has ruled that it had not acquired such jurisdiction.

(3) The defendants claimed that the assumption of jurisdiction and the appointment of receivers by the District Court violated the Eleventh Amendment to the Constitution of the United States. The Circuit Court has ruled that the Eleventh Amendment does not apply.

(4) The defendants claimed that the District Court abused its discretion by the appointment of trustees, in the guise of receivers, without notice or hearing and in pursuance of a bill showing on its face no need for a receivership. The Circuit Court has ruled that there was no abuse of discretion.

III. STATEMENT OF THE CASE.

A full statement of the case has been given in the petition at page 4 under the heading, "Summary Statement of the Matter Involved, (d) Statement of Facts," and in the interest of brevity it is not repeated here.

IV. SPECIFICATION OF ERRORS.

A specification of the errors intended to be argued has been given in the petition at page 3 under the heading "Summary Statement of the Matter Involved, (b) The Questions Presented," and in the interest of brevity it is not repeated here.

V. ARGUMENT.

(a) The Facts.

The Chester County Trust Company, of West Chester, Pennsylvania, acted as trustee for the holders of certificates issued by it against a trust fund of mortgages. On February 14, 1933 the Secretary of Banking took "possession of the business and property" of the trust company and filed with the Court of Common Pleas of Chester County a certified copy of his certificate of possession as required by the statute. (R. 137.)

For over six months the Secretary of Banking conducted the pool preparatory to filing an account and turning over the assets to a trustee to be appointed by the Court of Common Pleas.

On August 28, 1933, a non-resident of Pennsylvania holding certificates giving her an interest of about one-fifth of one per cent. in the mortgage trust fund filed a bill in the United States District Court naming the Secretary of Banking and his deputy receiver as defendants and asking for the appointment of Federal receivers of the trust fund. The sole basis for relief was the averment that "little effort" was being made to collect interest and to compel the payment of taxes *and that* only a receiver could remedy this situation. (R. 9.) On the same day a motion was filed for the appointment of a receiver (R. 6).

The bill and the usual twenty-day subpœna were served the next day (R. 7). The next day, one hour after giving the defendants a telephone notice, the court held a hearing on the motion. On the day of the hearing without giving the defendants' counsel an opportunity to file either an answer or a brief, without hearing testimony and without noti-

fying the beneficiaries of 99 4/5 per cent. of the trust fund, Judge Welsh appointed two receivers of the fund (R. 49). Two days later, without notice to the defendants or to their attorneys, the two receivers, accompanied by two others appointed for another mortgage trust fund under similar circumstances, appeared at the office of the Secretary of Banking in the former quarters of the trust company (twenty-six miles from Philadelphia), and demanded instant surrender of the trust assets. Employees of the defendants refused to comply. (R. 49.)

The next morning, Saturday before Labor Day, without notice to the defendants or to their counsel, who had appeared against the motion to appoint receivers, Judge Welsh allowed a rule on the deputy receiver and on two of his assistants to show cause why they should not be adjudged in contempt. This rule was served by a deputy United States marshal at about noon. It was returnable on Tuesday, the day after Labor Day. (R. 50.) On Labor Day one of the certificate holders other than the complainant procured from the Court of Common Pleas of Chester County an injunction restraining the State receiver from delivering any assets to Federal receivers. (R. 32.) At the hearing on Tuesday the defendants filed an answer in the contempt proceedings (R. 29), a motion to dismiss the bill (R. 43) and a petition to vacate the order appointing the receivers (R. 46).

The court then waited until September 22 to hear argument on the motion and on the petition. He then made an order changing his receivers to temporary receivers (R. 55), and he also caused the word "temporary" to be inserted in pen and ink all through the original decree. A further argument was heard four days later, and finally on October 4 the court refused to dismiss the bill or to vacate the appointment of the receivers (R. 73).

The District Court having refused to allow an appeal to the Circuit Court of Appeals and a supersedeas (R. 76), they were allowed by the Circuit Court of Appeals (R. 87).

The Circuit Court of Appeals heard argument on January 4, 1934. At the argument the owners of $326,250 of certificates filed a petition for leave to intervene and stated their active opposition to a Federal receivership (R. 122). No other certificate holder has been made a party to this proceeding or has appeared in it. On September 28 the Circuit Court of Appeals filed its opinion by Davis, J., affirming the lower court (R. 136). The Secretary of Banking has continued in possession of the trust assets which he has been liquidating since February 14, 1933.

(b) Exclusive Possession and Control of the Mortgage Trust Fund Are in the Commonwealth of Pennsylvania Through Its Secretary of Banking and Its Courts and Cannot Be Interfered With By a United States Court.

Among the "business and property" of the Chester County Trust Company of which the Secretary of Banking has taken possession are the business of conducting a mortgage trust fund and the property rights of the trust company in the compensation payable to it for conducting the trust fund or pool of mortgages.

Six sections of the Department of Banking Code are devoted to the Secretary's duties with regard to mortgage pools of closed institutions. These sections relate also to individual mortgages in which fractional interests have been assigned to several owners.

These sections (quoted in full at pp. 39-46 in the Appendix to this brief) provide that the Secretary shall file an account of the trust with the court of common pleas "as soon as it may be convenient", giving notice to all the bene-

ficial owners; that he may deliver the trust assets to the beneficial owners on their release, if they are sui juris; that any owner may at any time apply to the court of common pleas to appoint a substituted trustee, and that the Secretary shall so apply if no owner has done so within thirty days after the filing of the account. The court is required to conduct a hearing before appointing a trustee. The court may allow compensation for the services of the trust company and of the Secretary.

From these provisions it is plain that the Commonwealth takes entire control of a mortgage trust fund from the moment the receivership begins until the assets have been delivered either to all the beneficial owners on their own receipts, or to a new trustee appointed by the court of common pleas. Of course the provision for delivery to the owners was intended primarily to cover participated mortgages; it would scarcely be possible to apply it in the case of a mortgage trust fund of nearly two million dollars.

Whatever may have been the proper practice under the old act, which was silent as to mortgage trust funds, the Code of 1933, which became effective nearly two months before this bill was filed, states expressly that the Secretary may apply for a substituted trustee only if no application is made by a beneficial owner within thirty days *after the filing of an account.* (See Section 904 of the Code, quoted in full at p. 42 of this brief.) The Circuit Court of Appeals ignores this provision and states that the Secretary was at fault in failing to comply with provisions of the old act relating to trust estates generally. Though the action or inaction of the Secretary in applying for a substituted trustee cannot affect the possession and control exercised by the Commonwealth through its Secretary of Banking and its courts, we wish to point out

clearly that when this bill was filed, the Secretary was doing exactly what the statute then in force told him to do.

These receiverships would clearly be void if they were intended to transfer the commercial assets of the closed trust company from the Secretary of Banking to Federal court receivers. To sustain them would make the state liquidation laws worthless and would permit the Federal court to wrest from a state receiver the assets of any state bank or trust company having a depositor or other creditor living in another state. When the state officer has taken possession as receiver under the state law, the Federal courts must respect the state's authority. Exactly the same considerations apply to a trust fund held by the state receiver by virtue of his office.

In two cases in which petitions for certiorari have recently been granted (*Commonwealth of Pa. v. Williams, et al.*, Oct. Term, 1934, No. 394; *Gordon, Secretary of Banking v. Ominsky, et al.*, Oct. Term 1934, No. 395), the Commonwealth contends that a United States court cannot appoint a receiver for a quasi-public state corporation. The present case is even stronger, for not only did the state officer long ago take possession of the assets of the trust company, but the state law has put him in possession as "receiver" and has subjected him to the jurisdiction of a particular state court.

The principle of comity requires the United States court to respect the possession of the state officer, whether he is a court receiver or an executive officer of the state government. This principle is applied to prevent unseemly struggles between Federal and state authorities for the settlement of which no means is provided except the restraint and good sense of our courts, both Federal and state. Had the Secretary of Banking taken possession in

this case simply as an executive officer, he would nevertheless be protected in his possession by the principle of comity.

A parallel case, decided by the Circuit Court of Appeals for the Third Circuit is *Port Newark National Bank of Newark v. Waldron*, 46 Fed. (2d) 296 (C. C. A. 3d Circuit, 1930). There the "dominion" of the Comptroller of the Currency was sustained against the claim of a receiver appointed by the United States court.

(c) The Court of Common Pleas Has Exclusive Jurisdiction of the Mortgage Trust Fund.

The Circuit Court of Appeals has treated this problem as one of conflict between the Federal and the state courts. We have already shown that it is one of conflict between the power of the Federal court and the power of the Commonwealth of Pennsylvania exercised through its courts and its Secretary of Banking. However, it is essential to discuss the position taken by the Circuit Court of Appeals, for it opens the door to Federal receivership proceedings which can easily make the orderly and equitable liquidation of a state bank impossible.

The state statute requires the Secretary of Banking to file with the prothonotary of the court of common pleas a duplicate of the certificate of possession (Sec. 604, p. 34, of this brief); forbids any court to appoint any receiver other than the Secretary (Sec. 606, p. 37); and makes the Secretary, when he has taken possession, "responsible to the court in which the certificate of possession is filed, and not to any other court." (Sec. 701, p. 37.)

This is plain language. But the Circuit Court of Appeals says that filing the certificate with the prothonotary "is only a notice setting forth that the Secretary has

taken possession of the business and property of the corporation, does not invoke the jurisdiction of the court and asks nothing whatever of it."

The view taken by the Circuit Court leads to great confusion, unless the Supreme Court, in the other cases pending on certiorari, sustains our position that a Federal court cannot appoint receivers of a quasi-public state corporation. If filing the certificate of possession gives the court of common pleas no jurisdiction, that court can obtain jurisdiction only when the Secretary of Banking as receiver specifically invokes it. As the receiver files petitions for leave to sell assets, he will gradually bring those assets within the jurisdiction of the court. Except as he has taken such steps, every asset of a closed bank will lie wide open to Federal receivership proceedings, so that one may readily find the state receiver liquidating half of the assets of a bank while a Federal receiver liquidates the other half. The state receiver can protect himself from this only by filing with the court of common pleas immediately on his appointment, a petition saying, "I am a receiver of the business and property of a bank according to state law. I am afraid of a Federal receivership. I therefore ask you to enter a decree repeating what the statute already says—that I am a receiver subject to your jurisdiction." We take it that the Supreme Court of the United States will not compel the banking authorities of Pennsylvania to resort to such a step as this.

The Circuit Court of Appeals takes the position that the court of common pleas can acquire jurisdiction of the receivership only by the institution of a familiar proceeding, such as the filing of a petition. We submit that a state can give its courts jurisdiction in any way it sees fit. There is no magic in the familiar forms of court proceeding. The

state statute could say, "From the moment the Secretary of Banking takes possession of a bank, he is a receiver of the court of common pleas with no further ceremony." For convenience, the statute requires a certificate of possession to be filed with the prothonotary to mark the inception of the court's jurisdiction. So long as due process of law is respected, a state may give its own courts jurisdiction in any way it pleases.

(d) The Appointment of the Receivers Violated the Eleventh Amendment.

The Eleventh Amendment to the Constitution of the United States is:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The court below has assumed not only that there is diversity of citizenship, but that the defendants are "citizens" of Pennsylvania. It is true that the Chester County Trust Co., is, or was, a Pennsylvania corporation, and that the Secretary of Banking and his deputy, who are named as defendants, are citizens of Pennsylvania, though that is not averred in the bill. But the suit is not against the trust company, nor is it against the defendants as private citizens; it is against the defendants as officers of the Commonwealth. They are named in the bill thus: "Honorable William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Co."

Because the defendants are a receiver and his deputy under the jurisdiction of the court of common pleas of

Chester County, the principle of judicial comity forbids the United States court to appoint receivers of these funds. Because they are officers of the Commonwealth, acting for the Commonwealth in the liquidation of the affairs of the trust company, this suit against them is, in fact, a suit against the Commonwealth.

The defendants sued as state officers have not only been served with process, but one of them has been required to answer a charge of contempt. If Pennsylvania were a small, newly created state, in which the governor performed all the executive and administrative duties, it would be even more apparent that this suit is against the Commonwealth. Recent legislation in South Carolina has actually put certain banks in the "custody" of the governor (*Gibbes v. Zimmerman,* 290 U. S. 326; 78 L. ed. 342; 1933). If the governor himself had been in possession of these trust funds, had been served with process and had been summoned to appear in a contempt proceeding, there would be a plain violation of the state's dignity and a plain infringement of the state's power to liquidate the affairs of its own closed institutions. These suits are as truly against the Commonwealth as if the governor were named as a defendant.

The suits attempt an interference with state power which the Eleventh Amendment forbids. The purpose of the bills is to take from the state the further management of large funds. The Commonwealth of Pennsylvania having undertaken to liquidate the affairs of the trust company, the United States court cannot require the Commonwealth to relinquish part of that liquidation at the instance of a private citizen. Though the Commonwealth permits the fund to be lifted from its officers by appropriate action in its own court, it has not waived its right to the immunity

from Federal process granted it by the Eleventh Amendment. *Smith v. Reeves,* 178 U. S. 436; 44 L. ed. 1140 (1900).

The authorities show that a suit is against a state when it is sought to infringe a constitutional power of the state. In the case at bar it is sought to infringe the state's power to continue in possession of this trust fund until the court of common pleas directs it to be transferred. This is a direct attack upon the state's power to liquidate the affairs of its own trust company.

In suits against state officers, the Eleventh Amendment has been held to be inapplicable (1) where it is sought to prevent state officers from violating the Federal constitution. (*Scott v. Donald,* 165 U. S. 107; 41 L ed. 648; 1897; *Caldwell v. Sioux Falls Stock Yards Co.,* 242 U. S. 559; 61 L. ed. 493; 1917); (2) where the state officers are sued for personal torts. (*McCallum v. United States,* 298 Fed. 373; C. C. A. 9th Circuit, 1924; certiorari denied, 266 U. S. 606; 69 L. ed. 464); and (3) where it is sought to compel the state officers to perform purely ministerial functions. (*Ralston v. Crittenden,* 120 U. S. 390; 30 L. ed. 721; 1887).

Two Circuit Courts of Appeals have allowed preference claims against funds in the hands of a state banking commissioner. *U. S. F. & G. Co. v. Strain,* 292 Fed. 694 (C. C. A. 8th Circuit, 1923; affirmed on another point in 264 U. S. 570; 68 L. ed. 854); *Allen v United States,* 285 Fed 678 (C. C. A. 1st Circuit, 1923).

In each of the cases cited, the United States court said in effect, "When the state court distributes the fund, a certain person shall have a priority claim." Even though there is nothing in those cases to show that a state court had assumed jurisdiction of the fund, there was an interference by the United States court with the orderly procedure of state law, which seems to us clearly a violation of the

Eleventh Amendment. But even if we are wrong in this view, those cases cannot control the question now before the court. To allow a claim against a fund is one thing, but to lift the whole fund bodily from the hands of the state officer and from the control of the state is quite another thing. One is an interference with state powers which may be tolerable; the other is not only a total denial of the state's power, but it is a forcible removal of assets from the state's custody, accompanied in the case at bar by the use of contempt proceedings against the state officers. Brandeis, J., has pointed out the distinction between adjudicating rights in personam and taking "the res out of the possession and control of the state court" (*Lion Bonding and Surety Co. v. Karatz*, 262 U. S. 77, 88; 67 L. ed. 871, 880; 1923).

The Eleventh Amendment forbids these suits because they are direct attacks upon the dignity of the Commonwealth and upon its exercise of constitutional powers.

The following authorities support our view:

Ex parte Ayres, 123 U. S. 443; 31 L. ed. 216 (1887);

Fitts v. McGhee, 172 U. S. 516; 43 L. ed. 535 (1899);

Murray v. Wilson Distilling Co., 213 U. S. 151; 53 L. ed. 742 (1909);

Lankford v. Platte Iron Works Co., 235 U. S. 460; 59 L. ed. 316 (1915);

Missouri v. Fiske, 290 U. S. 18; 78 L. ed. 145 (1933).

In the present case the defendants are parties only because of their official positions. If either of them ceased to hold office his successor in office would have to be substituted.

The defendants are not charged with any act detrimental to the plaintiffs; they are not charged with acting under an unconstitutional statute, nor is it sought to compel them to perform merely a ministerial act required by statute. On the contrary, it is sought to remove from state officers property lawfully in their possession and to make them turn it over to others, contrary to the provisions of the state law.

(e) The District Court Abused Its Discretion by Appointing Trustees in the Guise of Receivers Without Notice to Any Beneficiary and Without Having the Facts Before It.

Even if there were no question of the power of the District Court to take these assets from the control of the Commonwealth, the appointments would be improper. If the appointees are regarded as temporary receivers, they were appointed without any evidence of necessity. If they are regarded as substituted fiduciaries in the guise of receivers, they were appointed without notice to any owner of certificates other than the plaintiff.

Consider the appointment first as an appointment of temporary receivers, as it purports to be. There is nothing on the record to show the necessity which alone justifies a receivership. No testimony was taken, so that the court has acted entirely on the averments of the bill. These averments are merely to the effect that interest and taxes are in arrears in many cases, that "little effort" is being made to compel their payment and that the certificate holders will suffer "irreparable damage" if receivers are not appointed. There is nothing to show bad faith or to show imminent danger to the interests of the certificate holders.

On these averments, without taking testimony, without notifying any other owner, and without waiting for the expiration of the time allowed by law for an answer the court below has prescribed the drastic remedy of receivership.

Every one knows that mortgage interest and principal are hard to collect today. But it does not do to say, "Interest, principal and taxes are not coming in well; therefore I must have a receiver". It must be shown that a receivership is a necessity. Here it cannot be shown that the rights of the parties can be protected only by a receivership; the state law has provided a complete method of protection which appears to be satisfactory to everyone concerned except these two plaintiffs.

The appointees are called receivers. It is plain, however, that the District Court has attempted to appoint in the guise of receivers persons who are intended to act as substituted fiduciaries. The decree signed on August 30th named the appointees as "receivers". On reflection the court below amended this three weeks later to read "temporary receivers". This means that the appointees are to hold temporarily while something else is being done. But what else can be done? The plain purpose of the appointments is to take the assets of the trust fund permanently out of the hands of the state officers and to prevent the court of common pleas from appointing substituted fiduciaries as provided by the state law. Prayer (b) of the bill asks that the receivers be authorized to take the assets "and to hold, manage and operate said mortgage pool" (R. 12). The decrees show that permanent positions are intended, for the appointees are given the powers appropriate to permanent receivers and are required to "make quarterly reports" to the court.

The bill in equity asks for receivers but the court has in effect appointed substituted fiduciaries. The appointment was made not only without asking the overwhelming majority of certificate holders to express their preferences, but with no notice to them of any kind. Such a procedure is entirely foreign to our system of equity jurisprudence.

The plaintiff owns $3700 of the fund involved. The petition to intervene filed with the Circuit Court of Appeals (R. 122) shows that the owners of $326,250 of the fund are actively opposed to a Federal receivership and wish the fund administered under the jurisdiction of the court of common pleas of Chester County. The court below has deemed the minute interest of this plaintiff to be so important as to justify the appointment of receivers without notice to the other owners and without any showing of necessity.

Though we wish the court to decide the important jurisdictional questions which we have discussed, we call the court's attention to the abuses which can attend the exercise of the power which the lower court has assumed.

VI. CONCLUSION.

Your petitioner respectfully submits that the determination by this Court of the questions of law involved in this case is of the utmost importance to all creditors, shareholders and trust beneficiaries of state banks and trust companies.

It is of the gravest consequence that a Federal court be permitted to appoint receivers to wrest from a state the control of a mortgage trust fund which has been asserted and exercised by the state's officer, under the supervision of the state courts, in pursuance of a state statute.

It is of the gravest consequence that the Circuit Court of Appeals has decided that the Commonwealth of Pennsylvania does not, through its Secretary of Banking and its courts, acquire exclusive jurisdiction of all the business and property of a closed bank or trust company in the method expressly provided by the state statute—that is by filing with the prothonotary of the court of common pleas a copy of the Secretary's certificate of possession.

The decision of the Circuit Court of Appeals permits a Federal court to violate the Eleventh Amendment to the Constitution by entertaining a suit which is in fact, though not in name, a suit against a state acting through its officer, and by enforcing the court's decree by contempt proceedings against the state's officer.

The decision of the Circuit Court of Appeals sustains the appointment of substituted trustees in the guise of receivers, without any of the safeguards essential to an equitable proceeding.

Unless this Court corrects the errors of the courts below and protects the states in their exclusive supervision and control of the affairs of closed banks and trust companies, an intolerable condition will arise in which the state authorities and the Federal courts will struggle for control of the liquidation of such institutions, without regard to the principles of comity which have made our dual system successful since the adoption of the Constitution.

It is vital that this Court determine this question of paramount public importance. State systems which provide for the governance of banks and trust companies must be preserved inviolate and be secured in future against unrestricted and unregulated attack by persons, technically nonresident shareholders, but actually mere pawns for professional receivership practitioners.

The petitioners ask this Court to issue its writ of certiorari to the Circuit Court of Appeals, and after a review of the case to reverse the decrees of the courts below, to vacate the appointment of the receivers and to direct that the bill in equity be dismissed.

Respectfully submitted,

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APPENDIX A.

PERTINENT PARTS OF DEPARTMENT OF BANKING CODE, ACT OF MAY 15, 1933, P. L. 565 (effective July 3, 1933).

1. General Provisions.

Section 2. *Definitions.—A.* The following terms shall be construed in this act to have the following meanings, except in those instances where the context clearly indicates otherwise:.

* * * * * *

"Court"—the court of common pleas of the county in which the corporation or person has its principal or only place of business in this Commonwealth; or, where an institution of which the Secretary is receiver is concerned, the particular court in which the certificate of possession, as defined later in this act, is filed.

Section 604. *Certificates of Possession; Filing.—A.* The Secretary, upon taking possession of the business and property of an institution as receiver, shall forthwith, under the seal of the Department, prepare in duplicate a certificate, to be known as the certificate of possession, setting forth that he has become receiver of the institution. It shall state the name of the deputy receiver whom the Secretary, pursuant to the provisions of this act, appoints to take charge of the affairs of the institution, and shall set forth the duties which he delegates to such deputy receiver. If the Secretary does not appoint a deputy re-

ceiver prior to the date of the filing of the certificate of possession, or if he appoints a new deputy receiver or an additional one, or if he adds to the duties of the deputy receiver, he shall prepare, in duplicate, and file a supplement to the certificate of possession.

B. The Secretary shall file the original certificate of possession and the original of any supplement thereto in his office in Harrisburg, and the duplicate certificate of possession and the duplicate of any supplement thereto in the office of the prothonotary. The certificate of possession filed in the prothonotary's office, and any supplement thereto, shall be listed in the judgment index in the name of the institution as defendant and of the Secretary as plaintiff.

C. In addition the Secretary shall, as soon as possible, file a certified copy of the certificate of possession, and of any supplement thereto, in the office of the recorder of deeds in each county in the Commonwealth, or with the proper official in any other state or country, in which any real property shall be situated which belongs to the institution or title to which is in its name, or upon which there is a mortgage or other lien which belongs to the institution or title to which is in its name. Such copy shall be recorded in the current deed book, and shall be indexed in the grantors' index in the name of the institution and in the grantees' index in the name of the Secretary, or it shall be filed, indexed, or registered by whatever other method is provided by the law of the particular county, state, or country in which such real property is located.

Section 605. *Injunction to Restrain Secretary.*—Any institution of whose business or property the Secretary has taken possession as receiver, may, at any time within

ten days after the Secretary has become receiver, apply to the court for an order requiring the Secretary to show cause why he should not be enjoined from continuing as receiver. Service may be made in such action by serving the Secretary personally, or by leaving a copy with the deputy in charge of his office in the Department, or by serving the deputy receiver appointed by the Secretary to manage the affairs of such institution. The court shall, after a hearing upon the merits, either dismiss the application or order the Secretary to surrender to the institution possession of its business and property, but no such injunction shall issue where the Secretary has been appointed receiver by action of a court of competent jurisdiction, or by action of the institution itself, in accordance with the provisions of this act.

Section 606. *Power of Courts to Appoint Receivers.*—No court shall appoint anyone but the Secretary as receiver of an institution. Whenever any court, at the instance of a depositor, shareholder, or other person entitled by law to institute such proceedings, shall determine that a receiver should be appointed, for any reason whatsoever, it shall appoint the Secretary as such receiver.

When thus appointed receiver by a court, the Secretary shall serve in the same manner and with the same limitations, and he shall have the same rights, powers, and duties, as when he becomes receiver by operation of law and without appointment by any court. No court shall impose upon the Secretary as receiver any duties or restrictions which are in conflict with the provisions of this act.

Section 701. *Status of Secretary as Receiver.*—Except as otherwise provided in this act, the Secretary, when he

has taken possession of the business and property of an institution, shall be responsible to the court in which the certificate of possession is filed, and not to any other court. His rights, powers, and duties shall be those of a general receiver appointed by any court of equity in this Commonwealth, except as such rights, powers, and duties are increased or limited by the provisions of this act. He shall be vested, in his official capacity, with all the rights, powers, and duties of such institution; with the title or the right to possession of all property to which the institution has title or the right to possession, including debts due, and liens and other security therefor; and with the institution's rights of action or redemption. This shall be so whether such property and debts due, such liens or other security therefor, or such rights of action or redemption, are held in the name of such institution, or in the name of some other corporation or person. He shall have power to execute in his name, as receiver, any instrument incident to the exercise of any power granted to or any duty imposed upon him as receiver of such institution.

The Secretary shall be the representative of the creditors of the institution and shall be entitled, as such, to have vacated and set aside, for the benefit of the creditors, any judgment, execution, attachment, sequestration, payment, pledge, assignment, transfer, conveyance, or encumbrance, which could have been avoided by any of the creditors, or by which one creditor is given an unlawful preference over another.

Section 709. *Power of Court to Make and Enforce Orders.*—The court in which the certificate of possession is filed shall sit as a court of equity. It shall have the power, upon petition of the Secretary, to make and enforce

any appropriate order to enable him, with the utmost dispatch, to discharge his duties in connection with the business and property of any institution of which he has taken possession, as receiver, pursuant to the provisions of this act.

The court shall grant to the party against whom the order is sought the right to appear, within ten days after notice is given, to show cause why the order should not be made. The court shall have the power, at the end of the ten-day period, ex parte if the other party does not appear to show cause, or upon the merits, if the party does appear, to issue the aforementioned order.

Note: The Department of Banking Code also provides for the sale of certain property, in some situations with leave of court and in some without leave, for compromises with leave of court, for accounting to the court and for distribution under order of court.

2. MORTGAGE POOL PROVISIONS.

ARTICLE IX.

Secretary in Possession of a Mortgage or Security Pool or of an Asset in Which Undivided Interests Are Held.

Section 901. *Mortgage and Security Pools and Participations; Accounts.*—Whenever the Secretary shall have filed a supplement to the certificate of possession, setting forth his determination to liquidate the affairs of an institution of which he is in possession as receiver, he shall, as soon as it may be convenient, file, in the court in which the certificate of possession shall have been filed, an account as to any mortgages, securities, or other assets comprising any mortgage or securities pool operated by such institution, or as to any mortgage, security, or other asset,

in which undivided interests shall have been created by the institution, regardless of whether certificates of participation in such mortgage or securities pool, or in such mortgage, security, or other asset shall have been actually issued by the institution, and regardless of whether the relation of the institution to the owners of the undivided interests in such mortgage or securities pool, or in any such mortgage, security, or other asset, is technically that of a trustee.

A mortgage or securities pool shall be regarded as having been operated by the institution, regardless of whether any or all of the mortgages, securities, or other assets in such pool shall be held in the name of the institution or in the name of a nominee of the institution. Where undivided interests have been created in any mortgage, security, or other asset by any corporation or person holding such mortgage, security, or other asset as nominee of the institution, such undivided interests shall be regarded as having been created by the institution.

The prothonotary shall not be under any duty to recopy or otherwise record any such account filed by the Secretary. He shall make no charge except the regular fee for filing such or similar papers.

Section 902. *Transfer of Pools and Participations without Filing an Account.*—If all the corporations or persons who are the owners of all the undivided interests in any mortgage or securities pool, or in any mortgage, security, or other asset in which the institution shall have created undivided interests, are sui juris, and if they shall agree to the amount asserted by the Secretary to be due him as receiver for services rendered by the institution or by him, and for expenses incurred by either, and if they

shall authorize the Secretary to transfer any such mortgage or securities pool, or any such mortgage, security, or other asset to them, or to a substituted fiduciary or to any other corporation or person agreed upon by them, and if they shall execute proper instruments releasing the Secretary and the institution from any further liability to them, the Secretary may transfer to such substituted fiduciary or to such corporation or person, without filing an account, all the mortgages, securities, or other assets comprising such mortgage or securities pool or the mortgage, security, or other asset in which undivided interests have been created. In any case where the institution, as fiduciary of an estate, is the owner on behalf of such estate of any undivided interest in any such mortgage or securities pool, or in any such mortgage, security, or other asset, and no substituted fiduciary has been appointed for such estate, the Secretary shall not transfer such mortgage or securities pool, or such mortgage, security, or other asset in which undivided interests were created by the institution, unless he shall also be authorized to make such transfer by all corporations or persons having an interest in the estate of which the institution was fiduciary, except that where substituted fiduciaries have not been appointed for unborn beneficiaries of the estate or for other beneficiaries who are not sui juris, the Secretary shall not be required to obtain such authority from anyone in behalf of such unborn beneficiaries or other persons who are not sui juris.

Section 903. *Notice of Filing Account.—A.* Upon filing an account as to any mortgages, securities, or other assets comprising any mortgage or securities pool operated by an institution of which he is in possession as receiver, or as to any mortgage, security, or other asset in

which the institution shall have created undivided interests, the Secretary shall give notice thereof, in so far as it may be practicable, to all corporations or persons who are the owners of the undivided interests in any such mortgage or securities pool, or in any such mortgage, security, or other asset, and, in any case where the institution as fiduciary of an estate, is the owner on behalf of such estate of any such undivided interest, then to all corporations or persons having an interest in such estate, except that no such notice need be given to anyone on behalf of unborn beneficiaries of such estate or other beneficiaries who are not sui juris, where no substituted fiduciary has been appointed for such beneficiaries. Such notice shall be given to the corporations or persons entitled thereto under this section, at their addresses as they appear on the books or other records of the institution, or, if the address of any such corporation or person does not appear thereon, then at the last known address of such corporation or person.

B. Such notice shall state the time and place of the audit of such account, and, except where an application for a substituted fiduciary shall have been made by any other method authorized by this act, it shall also state the intention of the Secretary to apply for a substituted fiduciary for such mortgage or securities pool, or for such mortgage, security, or other asset in which undivided interests were created by the institution, and the time and place of any hearing upon such application which may be fixed by the court.

Section 904. *Appointment of Substituted Fiduciary; Transfer of Pools or Participations upon Order of Court.* —*A.* After the filing by the Secretary of a supplement to the certificate of possession, setting forth his determina-

tion to liquidate the business and property of an institution, but either before or after the filing of an account by him as to any mortgages, securities, or other assets comprising any mortgage or securities pool, operated by such institution, or as to any mortgage, security, or other asset in which the institution shall have created undivided interests, the owner of any undivided interest in such mortgage or securities pool, or in such mortgage, security, or other asset, may file, in the court in which the certificate of possession is filed, a petition for the appointment of a substituted fiduciary for such mortgage or securities pool, or for such mortgage, security, or other asset in which undivided interests were created.

If such petition shall not have been filed by the owner of any such undivided interest within thirty days after the notice by the Secretary of the filing of an account as to such mortgage or security pool, or as to such mortgage, security, or other asset, the Secretary shall file, in the court in which the certificate of possession is filed, a petition for the appointment of a substituted fiduciary for such mortgage or securities pool, or for any such mortgage, security, or other asset in which undivided interests were created by the institution.

Upon the filing of such a petition by the owner of any such undivided interest, or by the Secretary for such mortgage or security pool, or for such mortgage, security, or other asset in which undivided interests were created by the institution, the court shall, upon a day fixed by it, conduct a hearing upon such application, after which it shall appoint a substituted fiduciary.

B. The Secretary shall transfer to the substituted fiduciary appointed by the court all such mortgages, securi-

ties, or other assets comprising any such mortgage or securities pool, or any such mortgage, security, or other asset in which undivided interests were created, as are in his possession as receiver, and as to which he shall have filed an account. The substituted fiduciary shall take such mortgages, securities, or other assets without liability for the nature or value of the mortgages, securities, or other assets as investments. Such transfer shall be made in accordance with the order of the court, and, in directing such transfer, the court may reserve for future determination any question of surcharge against the institution or the Secretary.

The court may, after petition filed pursuant to the provisions of this section, order the Secretary to make such transfer even prior to filing an account, in which case it may also reserve for future determination any question which may arise upon the audit of the account.

Section 905. *Advances by Secretary to Substituted Fiduciary.*—Whenever the Secretary shall have filed an account as to any such mortgage or securities pool, or as to any mortgage, security, or other asset in which the institution shall have created undivided interests, and it shall appear to the court that any sum of cash will be needed by the substituted fiduciary for the protection of the owners of undivided interests in such mortgage or securities pools, or in any such mortgage, security, or other asset, as to which such account shall have been filed, and if it shall appear from the account that the Secretary does not have any cash held by him in connection with such mortgage or securities pool, or in connection with any such mortgage, security, or other asset, or if the account discloses that the cash in his hands for that purpose is insufficient for the protection of the owners of the undivided

interests in such mortgage or securities pool, or any such mortgage or security, or other asset, or where no account is filed, if the Secretary shall demonstrate these facts to the satisfaction of the court, the court may, upon petition of the Secretary, and in the exercise of its discretion, order the Secretary to advance to the substituted fiduciary, out of the general assets of the institution, such cash as may be necessary for the protection of the owners of such undivided interest. Such order shall provide that the amount of cash so advanced by the Secretary shall be repaid by the substituted fiduciary out of the first moneys realized by such substituted fiduciary on the mortgages, securities, and other assets transferred to him.

Section 906. *Compensation and Expenses.*—The court, in its adjudication of any account filed by the Secretary as to any mortgage or securities pool operated by an institution of which the Secretary is in possession as receiver, or as to any mortgage, security, or other asset in which the institution shall have created undivided interests, shall award to the Secretary such compensation for services rendered and expenses properly incurred by the institution, or by the Secretary, as the court shall deem reasonable and proper under all the circumstances. The order of the court making any such award to the Secretary shall provide for the payment of such compensation or expenses out of any cash included in the account, or if there be no cash in the account, or if the amount of cash included therein is insufficient to pay the amount awarded to the Secretary, the order shall provide for the payment of such compensation or expenses out of the first moneys realized by the substituted fiduciary on the mortgages, securities, or other assets so transferred to such substituted fiduciary.

All sums received by the Secretary under this section shall become assets of the institution of which he is in possession as receiver.

When the court shall, pursuant to the provisions of this act, order the Secretary to transfer such mortgages, securities, or other assets, prior to the filing of an account, it shall similarly make provision for the payment of the compensation earned, or the expenses incurred, by the institution, or by the Secretary.

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IN THE

Supreme Court of the United States.

No. 549. October Term, 1934.

WILLIAM D. GORDON, SECRETARY OF BANKING, AND ROBERT G. FUNKHOUSER, SPECIAL DEPUTY AS AGENT IN POSSESSION OF CHESTER COUNTY TRUST COMPANY,

Appellants,

v.

LAURA A. WASHINGTON, COMPLAINANT, AND EDWARD W. WELLS AND RICHARD F. ENNIS, RECEIVERS OF TRUST FUND MORTGAGES AGGREGATING $2,901,236.07,

Appellees.

No. 550. October Term, 1934.

WILLIAM D. GORDON, SECRETARY OF BANKING, AND ROBERT G. FUNKHOUSER, SPECIAL DEPUTY AS AGENT IN POSSESSION OF CHESTER COUNTY TRUST COMPANY,

Appellants,

v.

MARY A. O'BRIEN, COMPLAINANT, AND JOHN HEMPHILL AND J. LOUIS BREITINGER, RECEIVERS OF TRUST MORTGAGES AGGREGATING $1,742,404.91,

Appellees.

BRIEF FOR PETITIONERS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

This case comes before the Court on Writ of Certiorari issued to review a final decree of the Circuit Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The opinions of the District Court and the Circuit Court of Appeals have not been reported.

STATUTES INVOLVED.

The Federal Statute involved in this proceeding, and referred to in the courts below, is Section 24 of the Judicial Code, as amended by the Act of March 3, 1911, c. 231, 36 Stat. 1091, 28 U. S. C. A., Sec. 41 (1), and is as follows:

> "The district courts shall have original jurisdiction as follows:
>
> "First. Of all suits of a civil nature at common law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and . . . is between citizens of different states."

The Pennsylvania statutes involved in this proceeding are the Act of June 18, 1923, P. L. 809, called the "Banking Act of 1923", and the Act of May 15, 1933, P. L. 565, called "The Department of Banking Code." The relevant sections of these Acts are set forth in the Appendix of this Brief, beginning at page 50.

The other Pennsylvania statute involved is Article 2 of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, quoted on page 34 of this brief.

The Section of the Constitution of the United States involved is the Eleventh Amendment, reading as follows:

> "The judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign state."

JURISDICTION.

The rules of this Court have been complied with.

A statement as to jurisdiction is a part of the Brief in Support of the Petition for Certiorari, which was printed and filed with this court.

STATEMENT OF THE CASE.

These are appeals from the decrees of the Circuit Court of Appeals for the Third Circuit, affirming decrees of the District Court in the Eastern District of Pennsylvania.

These decrees at first appointed permanent receivers for two mortgage pools, of which the Chester County Trust Company, of Chester County, Pennsylvania, was Trustee, and of which institution the Secretary of Banking for the Commonwealth of Pennsylvania had already taken possession in his capacity of statutory receiver under the Banking Act of 1923, and the Department of Banking Code of 1933.

Motions were filed by the appellants to vacate the appointment of the receivers and to dismiss the Bills in Equity. The Order appointing the Receivers was then amended so as to make them temporary receivers. Subsequently, after argument the motions of the appellant to vacate the appointment of receivers and dismiss the bills were overruled by the District Court.

On appeals to the Circuit Court of Appeals for the Third Circuit, the decrees of the District Court were affirmed on September 28, 1934.

The appellants filed their petitions for writs of certiorari on November 28, 1934. The Answer opposing the allowance of the writs was filed by the appellees. The writs were granted on January 7, 1935.

On February 14, 1933, the Secretary of Banking of the Commonwealth of Pennsylvania took "possession of the business and property" of the Chester County Trust Company, located in West Chester, Chester County, Pennsylvania. The Secretary of Banking filed his certificate of possession at his office in Harrisburg, and on February 15, 1933, filed a certified copy of that certificate in the Office of the Prothonotary of Chester County, who indexed it on the Judgment Index (R. 46). All this was in accordance with the requirements of the Act of June 15, 1923, P. L. 809, and entitled: The Banking Act of 1923 (R. 137).

Included in the "business and property" of which the Secretary of Banking took possession, were two trust funds or mortgage pools consisting of mortgages held by the Trust Company as Trustee, and against which it had issued participation certificates. The face value of the pool in case No. 549 was $2,901,236.07 (R. 136), and the value of the pool in case No. 550 was $1,742,404.91 (R. 136).

The Secretary of Banking, in accordance with the Banking Act of 1923, was a receiver under the jurisdiction of the Court of Common Pleas of Chester County.

On July 3, 1933, the Act of May 15, 1933, P. L. 565, known as "The Department of Banking Code," became effective. That Code recites the duties of the Secretary of Banking as receiver of a bank or trust company of which he has taken possession, and provides in Section 701:

> "Except as otherwise provided in this Act, the Secretary when he has taken possession of the business and property of an institution, shall be responsible to the court in which the certificate of possession is filed and not to any other court."

Article IX of the Code set forth in full, at page 56 in the Appendix to this brief, particularly describes the duties

of the Secretary of Banking, and the rights of interested parties with respect to mortgage trust funds or pools.

The Secretary of Banking has conducted these mortgage pools from the time when he took possession of the Trust Company on February 14, 1933, to the present time.

On August 25, 1933, a Bill was filed in the District Court of the United States for the Eastern District of Pennsylvania, in behalf of LAURA A. WASHINGTON, a citizen of Connecticut, naming as defendants "William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in possession of Chester County Trust Company."

The Bill stated that the complainant owned a Forty Thousand Dollar interest in the mortgage trust fund of $2,901,236.01 (which interest was about one and four-tenths per cent. of the fund); and averred on information, advice and belief that "little effort is made to secure the collection of interest," that "little effort is being made to compel payment of taxes," and that unless a receiver is appointed "the interest on said mortgages will continue in default and the taxes on many of the properties will continue to remain unpaid to the detriment and irreparable damage of the complainant and others holding like certificates."

There was no charge of improper conduct or mismanagement. The Bill *inter alia* prayed for the appointment of a receiver or receivers "to take charge of, conserve and administer" the pool; for an order on the respondents to turn over all the assets and records of the pool to the receivers; and for authority to the receivers to collect mortgage interest, to demand the payment of taxes, and to bring suit for the collection of the principal of the mortgages; and further prayed for an order restraining all interference with the receivers so appointed (R. 9). The subpœna was returnable September 14, 1933 (R. 1).

On August 28, 1933 a Bill in behalf of Mary A. O'Brien, a citizen of New Jersey, naming as defendants "William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company," was filed in the District Court of the United States for the Eastern District of Pennsylvania. The Bill was identical with that filed on behalf of Laura A. Washington, except that the Bill filed on behalf of Mary A. O'Brien was with respect to an interest of Thirty-seven Hundred Dollars (about one-fifth of one per cent.) in a mortgage pool aggregating $1,742,404.91 (R. 9). The subpœna was returnable September 18, 1933 (R. 6).

On August 28, 1933, attorneys for the complainants in both cases filed motions for the appointment of receivers (R. 6).

On August 30, 1933, before an appearance had been entered by counsel on behalf of respondents, Judge Welsh, after only one hour's telephone notice to counsel for respondents, by counsel for the complainants, held a hearing upon the motions. Counsel for the respondents appeared and argued the case and at the close of his argument requested an opportunity to file a brief. The court stated that a brief was not necessary. On the same day, within a few hours after the termination of the argument, without awaiting the filing of an Answer; without taking testimony; without any notice to those interested in the trust funds, and upon the bare averments of the Bills, the court appointed two receivers for the assets of each mortgage pool (R. 49). The Order directed the receivers "to hold and preserve" all the assets, and to "make quarterly reports to this court." The Order authorized the receivers to conduct and manage the mortgage pools; to collect principal and interest by suit or otherwise; to employ agents

and to pay out money for the preservation of the assets (R. 15).

On September 1, 1933, without prior notice or demand, the receivers for the respective mortgage pools, appeared at the Trust Company and demanded possession of all the assets and records of the respective mortgage pools. This possession was refused by two subordinates then on duty (R. 49).

On September 2, 1933, the Saturday before Labor Day, the court upon petition of its receivers, allowed a rule to show cause why the Secretary of Banking and his Deputy Agent, and their subordinates should not be adjudged in contempt (R. 24).

On September 4, 1933, the Court of Common Pleas of Chester County, upon application by a mortgage trust fund certificate-holder, issued an injunction restraining the appellants from relinquishing possession of the mortgage pool assets, pending further Order of the Court of Common Pleas of Chester County (R. 32), and this injunction was served upon the Deputy Receiver (R. 31).

On September 5, 1933, the persons named in the contempt proceedings appeared before the court and at that time there was presented and filed an Answer to the contempt petition (R. 29), a motion to dismiss the bills (R. 43), and a petition to vacate the appointment of the receivers (R. 46). No further action has been taken in the contempt proceedings.

Upon the day set for a hearing upon the motion to dismiss a petition to vacate the appointment of receivers, September 22, 1933, the court of its own motion entered a decree amending its form of decree so as to make the appointees "temporary receivers" (R. 55) and caused the original decree to be altered by inserting the word "temporary" with pen and ink throughout (R. 15).

A decree dismissing the prayer to vacate and overruling the motion to dismiss was entered by the court after the filing of an opinion (R. 66) on October 4, 1933. The court refused to allow an appeal and a supersedeas (R. 76) both of which were allowed by the Circuit Court of Appeals for the Third Circuit (R. 87).

On January 4, 1934 argument on the appeal was heard by the Circuit Court, at which time the owners of $326,250.00 of certificates in the mortgage pool in the O'Brien case (R. 122), and owners of $1,716,684.70 of certificates in the mortgage pool in the Washington case (R. 103), filed petitions for leave to intervene, stating their active opposition to Federal receivership. No other certificate-holders have been made parties to these proceedings or have appeared in it.

On September 28, 1934, the Circuit Court of Appeals filed an opinion (R. 136) and entered an Order (R. 149) affirming the decrees of the District Court.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the Third Circuit erred in that it affirmed the decrees of the District Court for the Eastern District of Pennsylvania, appointing receivers for the mortgage trust fund or pool, changing the designation of receivers to "temporary" receivers, dismissing the petition to vacate the appointment of receivers, and overruling the motion to dismiss the bill in the proceedings entitled "Mary A. O'Brien v. William D. Gordon, Secretary of Banking and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company, No. 7849, June Term, 1933," and the bill in the proceedings entitled "Laura A. Washington v. William D. Gordon, Secretary of Banking and Robert G. Funkhouser,

Special Deputy as Agent in Possession of Chester County Trust Company, No. 7485, June Term, 1933."

2. The Circuit Court of Appeals for the Third Circuit erred in entering the following order on September 28, 1934:

> "This cause came on to be heard on the transcript of the record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.
>
> "On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decrees of the said District Court in this cause be, and the same are hereby affirmed, with costs." (R. 149)

QUESTIONS INVOLVED.

1. Is a bill in equity naming the Secretary of Banking for the Commonwealth of Pennsylvania, a defendant, and which has for its purpose the substitution for the Secretary of Banking as state receiver, federal receivers, a suit against the State of Pennsylvania and contrary to the Eleventh Amendment of the United States Constitution?

2. Is the Secretary of Banking, when sued in his official capacity as a Receiver of a closed state bank, a citizen of the state within the meaning of Section 24 of the Judicial Code, as amended by the Act of March 3, 1911, c. 231, 36 Stat. 1091, 28 U. S. C. A., Sec. 41 (1)?

3. Assuming that the United States District Court had jurisdiction to appoint receivers to supplant the Secretary of Banking for the State of Pennsylvania, Receiver, was not their appointment in these cases a gross abuse of that discretion?

ARGUMENT.

SUMMARY.

Pennsylvania System is Complete. The Pennsylvania statutes provide a complete system for the liquidation of all the "business and property" of a closed trust company. The Secretary of Banking is directed to take possession of the trust company, to file a certificate of possession in his own office and to file a copy of it with the court of common pleas of the county where the trust company is located. The statute provides that the Secretary shall then be the receiver of the trust company and shall be responsible to "the court in which the certificate of possession is filed and not to any other court".

The statute specifically provides for mortgage trust funds or pools which come into the hands of the Secretary of Banking as receiver of a trust company. The Secretary is required to file an account and to deliver the assets to a trustee appointed by the court of common pleas. The petition for the appointment of a trustee is to be filed in the court of common pleas where the certificate of possession was filed by any mortgage certificate holder, or it may be filed by the Secretary himself if no certificate holder has acted *within thirty days after the notice by the Secretary of the filing of his account.*

State Already Had Possession and Control. In the present cases the Secretary filed his certificates of possession, took physical possession of the mortgage trust funds and managed the funds for over six months before the filing of the bills in the District Court. The funds were in the possession and control of the Commonwealth of Pennsyl-

vania, by its designated officer who was subject to the jurisdiction of its court.

State Receivership Must be Respected. It has been repeatedly decided that a Federal court cannot appoint a receiver to wrest the possession of assets from a receiver already appointed by a state court. It makes no difference whether the state receiver is a "statutory receiver" or a receiver appointed in pursuance of a bill in equity. In either case, the state receiver derives his authority from the state law and the Federal district courts must respect that authority. A contrary decision by this Court will lead to inextricable confusion in the liquidation of closed banks and trust companies.

No Decree of State Court Necessary. Even if the Federal courts will respect state receivers only if they are the creatures of state courts, the Secretary of Banking of Pennsylvania in this case is a receiver of the state court. The state may give its courts jurisdiction in any way it sees fit. A bill in equity is not a prerequisite. A state may provide, as Pennsylvania has provided, that its administrative officer shall become a receiver under the control of the court as soon as he files with the court his certificate showing that he has taken possession of a trust company. To say that a further decree of the court is necessary to establish its jurisdiction over the Secretary of Banking, is to require of the court an act of supererogation which can add nothing to the express statutory provision giving the court jurisdiction as soon as the Secretary of Banking files his certificate of possession. Though the decision of the Circuit Court of Appeals in this matter is stated as applicable only to the present case, the principle would apply equally to all the assets of a closed bank or trust company and would make the entry

of a formal decree necessary in every case to avoid the danger of Federal receiverships.

Violation of Eleventh Amendment. The Commonwealth of Pennsylvania having acquired through its officers and its courts, complete possession and control of the mortgage trust fund, a suit against its officers to take away that possession and that control is a suit against the Commonwealth of Pennsylvania. The Eleventh Amendment to the Constitution of the United States provides that the judicial power of the United States shall not extend to such a suit.

Lack of Diversity of Citizenship. A suit against state administrative officers in their official capacities is a suit against the state, and in the absence of any constitutional question the court has no jurisdiction because there is no diversity of citizenship within the meaning of Section 24 of the Judicial Code as amended by the Act of March 3, 1911, c. 231, 36 Stat. 1091; 28 U. S. C. A., Section 41 (1).

Abuse of Discretion. The District Court abused its discretion in appointing receivers.

The bill in equity stated no complaint except that "little effort is made" to secure the payment of mortgage interest and that "little effort is made" to compel the payment of taxes, followed by the conclusion that unless receivers are appointed the interest and the taxes will remain unpaid and the certificate holders will be irreparably damaged.

A "hearing" on the bill was had the day after it was served, and with no opportunity to counsel to prepare a brief or properly to consider the case. No answer was filed and no testimony was taken. On the same day trustees of the pool were appointed in the guise of receivers. No certificate holder, except the complainant in No. 550 who owned one-fifth of 1 per cent. of the fund in her pool, and the com-

plainant in No. 549 who owned 1 4/10 per cent. of the fund in her pool, had notice of the proceedings. It was attempted to enforce the decree appointing receivers by contempt proceedings against the subordinates of the Secretary of Banking in charge of the trust fund. When the district judge dismissed the petitions to vacate the orders appointing receivers and overruled the motion to dismiss the bill, the court refused to allow an appeal with a supersedeas and it was necessary to apply to the Circuit Court of Appeals. The holders of a large proportion of the funds have shown, by their petitions to the circuit court for leave to intervene, that they object strongly to a Federal receivership.

Aside from any question of jurisdiction, the district court abused its discretion and should have dismissed the bills and relegated the complainants to the complete remedy afforded them by the state law which provides for the appointment of substituted trustees after notice to all parties in pursuance of orderly procedure.

I. It Was an Abuse of Discretion for the Federal Court for the Eastern District of Pennsylvania to Appoint the Receivers in This Case.

It may be stated as a broad proposition that the Federal Court, in the exercise of its general equity jurisdiction, does have the power to appoint receivers for property within its jurisdiction. This power has often been stated to be a discretionary one. Granting the truth of this, it must also be recognized that the discretion to be exercised is not as broad as individual conscience, but is limited by the confines of many decisions.

It is pertinent to observe the remarks of Chief Justice Marshall in OSBORNE v. UNITED STATES BANK, 9 Wheaton 738 (1824) at page 866, where he stated:

"Judicial power as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court, to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."

As Section 7669 of Fletcher's Cyclopedia of Corporations expresses it:

"The distinction between 'jurisdiction' to appoint a receiver and whether the power, if it exists, shall be exercised, must always be kept in mind. Jurisdiction of a court of equity to appoint a receiver is one thing, and whether the court will exercise its jurisdiction is an entirely different matter. While courts hesitate to appoint a receiver, especially when the corporation is solvent, this does not mean that there is want of jurisdiction to appoint a receiver, it being well said that 'judicial hesitancy does not mean judicial atrophy or paralysis.'"

And again in Section 7697:

". . . The power of appointment [*of receivers*] is a delicate one, and to be exercised with great circumspection. Indeed, the courts have held repeatedly that the power to appoint a receiver should be exercised with great care and the utmost caution and only in case of an emergency . . . or . . . 'extreme necessity,' . . . and more especially is this true where the corporation is solvent, or the defendant corporation is a bank. . . . 'A receivership is not a panacea

for all business ills. The remedy may be worse than the disease.' . . . 'A receivership is the most drastic remedy and the most expensive luxury known to the realm of the law.' . . ." Citing Furrer v. Nebraska Building and Investment Company, 189 N. W. 359 (Neb.).

This language applies with particular force to banking institutions. This is especially so in view of the fact that the legislatures of many states have enacted laws giving to statutory officers the duty to liquidate these institutions under the supervision of the local courts. The legislatures evidently had in mind the avoidance of the well-known abuses which have become so costly to creditors and stockholders in receiverships of ordinary corporations.

In his article on "The Abuses of Receiverships," in XIX Yale Law Journal 275 (1910), Judge Jacob Trieber of the United States District Court in Arkansas, said:

"The appointment of a receiver and the granting of a temporary injunction, like the granting of specific performance of contracts, is not a matter of absolute right, but is within the sound discretion of the court, guided by the established principles, rules and practices in equity. One of the well-established rules is that courts of equity will not grant any interlocutory relief if the injury caused the defendants by reason thereof will prove very great, while the benefits to the party applying therefor will be but small compared with the injury inflicted upon the defendant. Still, in spite of these well-settled equitable principles, it is not unusual for appointments of receivers to be made upon the most flimsy allegations, and sometimes even without notice to the parties directly affected thereby: . . ."

Experience shows this to be true.

There is a real and extensive public interest involved in the state supervision and regulation of banks. Judges should hesitate a long while before applying to such institutions the extraordinary remedy of receivership.

A. In the Absence of Clear Proof of Maladministration, Corruption or Fraud, a Federal Court Should Not Disturb an Administrative State Agency in Its Possession of the Assets of a Quasi-Public Institution.

The Legislature of the Commonwealth of Pennsylvania has provided a complete Code of Laws relating to the organization, administration and liquidation of all types of quasi-public institutions. In the Pennsylvania Banking Act of 1923, Act of June 15, 1923, P. L. 809, as amended by the Act of May 5, 1927, P. L. 762, and as superseded by the Department of Banking Code of 1933, Act of May 15, 1933, P. L. 565, provisions are made for the liquidation of the business and property of banks and trust companies within the Commonwealth.

It cannot be questioned that the Secretary of Banking, in taking possession of the banking institution, either under the Banking Act of 1923 or as a "receiver" under the Act of 1933, took possession of the mortgage pools. (Act of May 15, 1923, P. L. 809, Section 4; Act of May 15, 1933, Section 901 *et seq.*, Appendix page 56).

The Act of 1923 and Section 801 of 1933 provide that, in taking possession of the business and property of any banking institution, the Department and the Secretary of Banking shall likewise take possession of all the funds or property held by the bank in any fiduciary capacity. In addition to this, Article IX, Sections 901 *et seq.*, of the Department of Banking Code of 1933 specifically provides, with reference to mortgage pools, that the Secretary shall

file an account with the Court of Common Pleas "as soon as it may be convenient", giving notice to all the beneficial owners; that he may deliver the assets to the beneficial owners, if they are sui juris; that any owner may at any time apply to the Court of Common Pleas of the county in which the certificate of possession is filed to appoint a substituted trustee; and that the Secretary shall so apply, if no owner has done so, within thirty days after the filing of the account; that the Court shall conduct a hearing before appointing a trustee; and the Court may allow compensation for the services of the trust company and of the Secretary.

From these provisions it is plain that the Commonwealth takes entire control of a mortgage trust fund from the moment the receivership begins until the assets have been delivered either to all the beneficial owners or to a new trustee appointed by the Court of Common Pleas.

Other than in a few recent cases in the Third Circuit, it was generally recognized that a Federal Court would not interfere with the state administrative control of quasi-public corporations.

Significant Cases.

In O'NEILL v. WELCH, 245 Fed. 261 (C. C. A. 3, 1913), which, ostensibly, rests upon the priority of State Court jurisdiction, it was expressly recognized that the administration of an insurance company in accordance with State Statutes was paramount to the power of the Federal Court. In that case, Judge Woolley stated, at page 268:

"... When, therefore, the statutory proceeding has been begun in a State court and by its commencement jurisdiction has been acquired over the corporation, neither the corporation nor its stockholders, nor its creditors can divest the court of its jurisdiction

or deprive the State of its public function by subsequently invoking the aid of a Federal court to remove the corporation's property beyond the reach of the State court and thereby withdraw from the State court the subject matter of the action there pending. *If this were not so, every action instituted by the State government against an insurance company might be interrupted and defeated by a non-resident stockholder filing in a Federal court a bill accompanied with the answer of an acquiescing corporation, after action has been begun in the State Court and before in its orderly progress the property of the corporation has been physically seized. Thus the policy of the State would be thwarted and its administration overthrown; the State's creature would be more powerful than the State itself. We are satisfied that no such thing was contemplated either in Federal or State policy.*" (Italics supplied.)

In LYON v. MCKEEFREY, 171 Fed. 381 (C. C. A. 3, 1909), in upholding the right of a state banking official to compel Federal receivers to turn over the assets of a state bank to him, Judge Gray said, at page 392:

"The defendant corporation was a creature of the laws of Pennsylvania, and by those laws the rules governing its existence were prescribed. The measure of control to be exercised over its own corporations was determinable by the law and policy of the state to which they owed their being. By the legislation here in question, the State of Pennsylvania has seen fit to subject such corporations to supervision and administrative control and has ordained the proceedings, partly administrative and partly judicial, by which the life of such corporations may be determined and their affairs wound up and liquidated. The judicial proceeding is not one that may be instituted by private parties, but by the Attorney General of the State, acting on behalf of the Commonwealth and in the interest of the public. Such

a proceeding is not one of which a United States court can have concurrent jurisdiction. It does not involve a controversy between private parties, whether citizens of the same state or of different states."

In MITCHELL v. LAY, 48 F. (2d) 79, (C. C. A. 9, 1930) (Certiorari denied 283 U. S. 864, 75 L. Ed. 1469 [1931]), the Court recognized the supremacy of the Statute Law of California, which established a procedure for the liquidation of insurance companies.

The Circuit Court of Appeals for the Fifth Circuit has likewise recognized a Federal Court should not appoint a receiver to liquidate a bank in a case where the Laws of the State provide for a complete method of liquidation.

BANK OF BAY BISCAYNE, ET AL. v. HANKINS, ET AL., 42 F. (2d) 209 (C. C. A. 5, 1930).

Using equally forceful language, the State Courts have repeatedly upheld the systems established by State Law to supervise and liquidate banks and other quasi-public institutions.

ABBOTT, COM. OF BANKING, v. MORRIS, Judge, 132 S. E. 372 (S. C. A. W. Va. 1926).

GREEN, SUPERINTENDENT OF BANKS, v. SMITH, ET AL., 129 So. 92 (S. Ct. Fla. 1930).

STATE OF FLORIDA, EX. REL., DADE COUNTY SECURITY CO., ET. AL., v. BARNS, ET. AL., 128 So. 860 (S. Ct. Fla. 1930).

STATE OF FLORIDA, EX REL., LANDIS, ATTY. GEN. v. CIRCUIT FOR ELEVENTH JUDICIAL CIRCUIT, ET. AL., 135 So. 866 (S. Ct. Fla., 1931).

STATE OF FLORIDA, EX. REL., PORTER, ET. AL., v. ATKINSON, CIRCUIT JUDGE, ET. AL., 146 So. 51 (S. Ct. Fla., 1933).

STATE OF MISSOURI, EX. REL., MISSOURI STATE LIFE INS. CO. v. HALL, JUDGE, ET. AL., 52 S. W. (2d) 174 (S. Ct. Mo., 1932).

STATE OF OHIO, EX. REL., BETTMAN v. COURT OF COMMON PLEAS OF FRANKLIN COUNTY, 178 N. E. 258 (S. Ct. Ohio, 1931).

UNION SAVINGS AND INVESTMENT CO. v. DISTRICT COURT OF SALT LAKE COUNTY, 140 Pac. 221 (S. Ct. Utah, 1914).

That the system for the liquidation of banks through an administrative agency of the Government is an exclusive one was also recognized by the Federal Court in PORT NEWARK NATIONAL BANK OF NEWARK v. WALDRON, 46 F. (2d) 296, (C. C. A. 3, 1930). There the "dominion" of the Comptroller of the Currency was sustained against the claim of a receiver appointed by the United States Court.

In a case virtually identical with the cases here presented, that for which the Commonwealth contends was upheld. In AMOS, COMPTROLLER OF STATE OF FLORIDA, v. TRUST COMPANY OF FLORIDA, ET. AL., 54 F. (2d) 286 (C. C. A. 5, 1931), the District Court attempted to assume jurisdiction over a series of trusts, operated by the Trust Company of Florida. The Comptroller, a State Administrative Officer akin to the Secretary of Banking of the Commonwealth, intervened, appointed a liquidator under the Florida Statute, and then moved to dissolve the receivership. The District Court, which denied the Comptroller his claim, was reversed by the Circuit Court of Appeals, which stated, by Judge Sibley, at page 289:

> "We need not inquire whether the equity jurisdiction of a federal court may be thus curtailed by state law, because in this case a general receivership for the Trust Company of Florida was denied, and particular

relief only was granted touching certain trusts. We need only inquire whether under general principles of equity the relief granted was proper. In the unforeclosed trust mortgages, the Trust Company of Florida had a title in trust, with a contract right under which fees might be earned. In those which had been foreclosed it held title in fee, but subject to equitable rights in the several bondholders. In all cases it claims to have made advances in the line of its duties as trustee and to preserve the property for which it has a lien thereon, totaling over $400,000, more than twice its capital stock. The safety of this investment and the solvency of the company depend on the management and eventual disposition of the trust properties. The handling of these two hundred trusts is the major part of the business of the company. It is plain that the trusts are in a very substantial sense property and business of the Trust Company which the comptroller may seize and liquidate under the law. *The comptroller and his liquidator are competent to execute trusts like those here involved; they being within the powers of the corporation to be liquidated.* Power v. Chillingworth, 93 Fla. 1030, 113 So. 280. Even if the corporation placed in liquidation has been an unfaithful trustee, no presumption can be indulged that the state officials will not be careful, efficient, and economical. A proper respect and deference on the part of the federal agencies of government toward those of the state compels that assumption. It is said in Knott v. Morris (Fla.) 134 So. 615, that *fraud, corruption, maladministration or other illegality in the liquidation must be established to justify court interference. No such thing here appearing, the court correctly refused to take over the liquidation of the Trust Company of Florida by a general receivership, but improperly took over a large part of its assets and affairs by the special receivership and by enjoining the comptroller from exercising his functions in reference thereto.*" (Italics supplied.)

In his decision Judge Sibley followed the prior decision of that Circuit in BANK OF BAY BISCAYNE, ET. AL., v. HANKINS (supra).

A petition for Writ of Certiorari was denied by this Court. (285 U. S. 559, 76 L. Ed. 947, 1932.)

Clearly the Secretary of Banking had a right to administer all the assets of the Chester County Trust Company, including trust property within the limitation of his statutory authority, free from any interference by a Federal Court, except in cases of gross mismanagement or fraud, of which no evidence was adduced in these cases.

Further, it is argued by the Appellees that whatever comity exists, exists between the Federal and the State Courts as courts, and not between the Federal Court and the State as sovereign. Such an argument seems to us to be trying to pull a camel through the eye of a needle. The State Court must look for the source of all powers in two places.

(1) The Statutory Laws of the State; and

(2) The Common Law in its legal and equitable applications.

In fact, the Statutory Law of the State may be said to arise from the experiences and *mores* of the people of the State. The State stands in relation to the Court as *pater curiæ;* the common law being *mater curiæ.* Therefore, when the State has first taken jurisdiction the comity which extends between State Court and Federal Court should extend between the Federal Court and the State. The logic of the situation implies that the sources of all power receive the same consideration as any particular manifestation of that power.

B. Under the Laws of the Commonwealth of Pennsylvania, Jurisdiction Over the Distribution and Control of the Mortgage Pool Assets Was in the Court of Common Pleas of Chester County.

Neither the District Court nor the Circuit Court denied that if the State Court had here acquired jurisdiction, the subsequent assumption of jurisdiction by the Federal Court should have been denied. It is, however, contended that no jurisdiction over the *res* had been acquired by the Court.

When the Secretary of Banking took possession, he did so under the provisions of Sections 21, *et seq.*, of the Banking Code of 1923, as amended by the Act of May 5, 1927, P. L. 762. This Act provided that when the Secretary takes possession, he shall file a certificate to that effect in the office of the Prothonotary (Section 22, Appendix page 50); within ten days thereafter the institution may apply to the Court in which the certificate of possession is filed to enjoin the Secretary of Banking from continuing in possession (Section 23, Appendix page 50); that the Secretary shall have all the rights, powers *and duties* of a receiver appointed by any Court of Equity (Section 29, Appendix page 50); and that the Court having jurisdiction shall have the power to make and enforce any and all orders necessary and appropriate to enable the Secretary to discharge his duties (Section 30).

Even if for a moment we fail to consider the plain language of the Act of 1933, it would seem under the Act of 1923, as amended, that the Court in which the certificate of possession was filed, did thereby acquire jurisdiction.

It is hardly conceivable that there is any distinction between the equity-appointed receiver and the statutory-designated receiver under the Act of 1923. In either case

the receiver is subject to the control of the appointing or designated court. In either case the receiver's accounts are audited, in either the appointing or designated court; and, as a necessary incident thereto, the receiver is subject to sur-charge in either the appointing or designated court. The only distinction between the two cases is that in one case the appointment is upon petition to the Court and, in the other, the status acquired by legislative fiat is subjected to a designated court.

The mechanism differs but slightly from that set up in the Act of May 13, 1876, P. L. 161, or in the Act of February 11, 1895, P. L. 4. Under either Act the Court appointed "receivers" upon the application of the Auditor General (the predecessor of the Secretary of Banking), and the corporation for which the receiver had been appointed could apply to the Court for the purpose of enjoining the proceedings instituted by the Auditor General.

The obvious intent of the Act of 1923 was to do just what was done by these prior Acts, save that a speedier method of conferring jurisdiction upon the courts was evolved. It is submitted that a Legislature, in any manner it sees fit, may confer jurisdiction upon its courts.

If there was any doubt as to the nature of the jurisdiction of the Court of Common Pleas, this would seem to have been settled by the Act of May 15, 1933, P. L. 565. It is there provided (Section 601, Appendix page 52):

> "Whenever the Department takes possession of the business and property of an institution, the Secretary shall *by operation of law* simultaneously take over such possession from the Department and become receiver of such institution, subject to the provisions of this Act. His official title . . . shall be receiver of such institution". (Italics supplied.)

Under the Act, the Secretary is required to file a certificate of possession with the office of the Prothonotary (Section 604, Appendix page 52); and the institution involved may, within ten days apply to the Court for an order requiring the Secretary to show cause why he should not be enjoined from continuing as receiver (Section 605, Appendix page 53).

The Act further provides that suits against the Secretary as Receiver shall be instituted only in the Court in which the certificate of possession is filed; that with *leave of Court,* the Secretary may surrender burdensome assets, pay off mortgages, sell real property and enter into long-term leases.

It is significant to note that the definitive section of this Code defines "court" as the court in which the certificate of possession is filed, and "prothonotary" as the Prothonotary of *that* court.

In no clearer language could the Legislature have stated that the Secretary was subject to the Court in which he filed his certificate of possession.

The Courts are in accord upon the proposition that if the Secretary of Banking, in accordance with statute, had proceeded to have himself appointed receiver by a court of equity, such facts would have constituted an effective bar to the assumption of jurisdiction by the Federal Court, even though the statute under which he had proceeded provided that his duties should be identical with those imposed upon him by the Act of 1933, and even though the Act prescribed no greater measure of allegiance to any court.

In JACOBY v. BOND AND MORTGAGE GUARANTY COMPANY, 72 F. (2d) 420 (C. C. A. 2d, 1934), the Superintendent of Insurance of the State of New York, acting in accordance

with statutory authority, applied to the New York Court, and, under its order, took possession of the company's assets. It was held that a Federal Court erred in appointing trustees of the fund and enjoining the Superintendent of Insurance from interfering with the trustees to appointed.

A Writ of Certiorari was denied by this Court on December 3, 1934, 55 Sup. Ct. 216.

MITCHELL v. LAY, 48 F. (2d) 79 (C. C. A. 9, 1930) and AMOS v. TRUST COMPANY OF FLORIDA, 54 F. (2d) 286 (C. C. A. 5, 1931), both of which have been discussed, are cases in which a Federal receiver was even forced to retreat in favor of a subsequently court-appointed State officer appointed under statutory authority and direction.

If it be argued that the Court acquires no jurisdiction except as particular matters are brought before it, we might analogize the present case to the famous HARKINS v. BRUNDAGE, 276 U. S. 36, 72 L. Ed. 457 (1928). The filing of the certificate of possession in the instant case is analogous to the mere filing of the bills in HARKINS v. BRUNDAGE. In neither case does the Court have actual knowledge of the proceedings from the mere fact of filing, and yet in HARKINS v. BRUNDAGE it was stated and held, at page 43:

> "As between two courts of concurrent and coordinate jurisdiction, the court which first obtains jurisdiction and *constructive* possession of property *by the filing of the bill* is entitled to retain it without interference and cannot be deprived of its right to do so because it may not have obtained prior physical possession by its receiver of the property in dispute."

Thus, even if actual possession of the property of the trust company, including the mortgage pools, had not been acquired by the Court upon the mere filing of the certificate

of possession, we submit that such a filing was analogous to the filing of the bill in HARKINS v. BRUNDAGE, and that in issuing its order, enjoining the Secretary of Banking from turning over any of the assets of the trust company, the Common Pleas Court of Chester County took cognizance of the certificate.

Further, under the doctrines enunciated in MITCHELL v. LAY and AMOS v. TRUST COMPANY OF FLORIDA (both supra) the Federal Court should have relinquished any prior assumption of jurisdiction, at least, at the time when the State Court took cognizance of the statutory dictates and ordered the Secretary to refrain from relinquishing possession.

C. A RECEIVERSHIP IS NEVER AN END IN ITSELF; AND THE PETITIONERS HAVE FAILED TO PROVE FACTS SHOWING THE NECESSITY OF APPOINTMENT OF RECEIVERS.

In PUSEY v. JONES, 261 U. S. 491 (1922), Mr. Justice Brandeis said, at page 497:

> "Whether the debtor be an individual or a corporation, the appointment of a receiver is merely an ancillary and incidental remedy. A receivership is not final relief. The appointment determines no substantive right, nor is it a step in the determination of such a right. It is a means of preserving property which may ultimately be applied toward the satisfaction of substantive rights."

In HOME MORTGAGE CO. ET AL. v. RAMSEY, 49 F. (2d) 738 (C. C. A. 4, 1931), reference is made to that authority, and the above citation from the opinion of the Supreme Court in the PUSEY v. JONES case is quoted and the rule is laid down as follows, at page 743:

> "Moreover, *the proposition is well settled that a federal court has no jurisdiction to entertain a suit for*

the appointment of a receiver where the receivership is sought as an end in itself. A receivership is essentially a temporary remedy to protect and conserve the property involved during the pendency of the principal action. Pusey & Jones v. Hanseen, 261 U. S. 491, 497, 43 S. Ct. 454, 67 L. Ed. 763; Brictson Mfg. Co. v. Close (C. C. A. 8th) 280 F. 297; Willeon v. Waltham Watch Co. (D. C. O.) 293 F. 811; Zuber v. Micmac Gold Mining Co. (C. C.) 180 F. 625; 23 R. C. L. 11; High on Receivers, Sec. 6." (Italics supplied.)

The bills in the instant case pray for no ultimate relief. They are definitely bills for the appointment of the receivers and nothing else. No substantial relief, to which a receivership might be incidental, is contemplated. In fact, the prayers of the bills of complaint (Paragraph 14, Record 11 et seq.) imply that receivers shall indefinitely continue to operate the pools and the Order appointing the receivers (R. 15). contemplates nothing more than the appointment of substituted trustees in the guise of receivers.

In HOME MORTGAGE CO. v. RAMSEY, *supra,* the Court denied the right of a Federal Court to appoint a receiver where a bondholder of the mortgage company averred its insolvency and prayed for the appointment of a receiver to take over all the property of the company and to administer it under the order of the Court. The Court stated that the prayer for receivership was not in contemplation of ultimate relief, in that the effort of the petitioners was to cause the displacement of a trustee.

In the instant case the District Court admits in its opinion (R. 66, 67):

> "After argument and *upon consideration of the averments* of complainant's bill, the Court granted complainant's motion for the appointment of a receiver" . . .

Thus the Court admits that the appointment of the receivers was solely upon the bare averments of the bill. These averments were all made upon information and belief and were to the effect that little effort was being made to compel the payment of interest and taxes, and that the certificate holders will suffer irreparable damage if receivers are not appointed.

The Judge of the District Court in his opinion states that the prayer of the bill and the motion of the complainants are for the appointment of a receiver pending hearing on the bill and answer. Examination of both the petition (R. 9) and the motion for the appointment of a receiver (R. 14) fail to indicate an intention that only temporary receivers are to be appointed. In fact, the very form of the decrees show that permanent positions were intended for the appointees, who were given powers appropriate to permanent receivers and were required to make quarterly reports to the Court. The Court even went so far as to appoint the receivers more than two weeks before the time fixed for the filing of an answer to the bill and the return day of the subpœna.

In answer to the Court's statement that it had only intended to appoint temporary receivers, it is significant to call attention to the fact that the decree was not amended so as to make the receivers temporary until the very day of the argument upon the motion to dismiss the bill and vacate the appointment of the receivers. Under these circumstances, and under the form of the original decree, how could the defendants have had an opportunity to file an answer before the rendition of an "apparently" final decree.

Nor was there in this case any showing of necessity that receivers be appointed. In HOME MORTGAGE CO. v. RAMSEY,

49 F. (2d) 738 (C. C. A. 4, 1931), the Court stated at page 742:

> "The appointment of receivers is to be resorted to only in cases of necessity and when no other remedy is available."

In MITCHELL v. LAY, 48 F. (2d) 79 (C. C. A. 9, 1930) the Court stated, at page 83:

> "It would seem clear that before the plaintiff was justified in coming into a court of equity for the appointment of a receiver and the liquidation of the affairs of the insurance company, she should have exhausted her remedy against this special fund deposited for her benefit. Whether upon the ground of diversity of citizenship and in default of any judicial proceeding in the State Courts, a Federal Court of Equity might enforce the rights of a non-resident to such fund or take jurisdiction thereof, is a question not involved in this case, for there is no claim that there has been any default or misconduct on the part of anyone with reference to the deposit in question. The *plaintiff has not attempted to secure any part of said fund by any of the methods provided by law and, therefore, is not in a position to invoke a court of equity to enforce rights which she herself has not undertaken to secure according to the procedure outlined by the State Law.*" (Italics supplied.)

The Legislature of the Commonwealth of Pennsylvania has provided a complete code, regulating and defining the rights of participants in mortgage pools. In the same way that the complainant in MITCHELL v. LAY, *supra*, failed to show that she had sought the res in the manner defined by State Law, so here it does not appear anywhere upon the record that the complainants sought a substituted fiduciary in the manner provided therefor in Article IX of the Department of Banking Code of 1933.

The many decisions under the Bankruptcy Act, which provides for appointment of receivers "*in case the Court shall find it absolutely necessary for the preservation of assets*", (Section 2, Clause 3 of Bankruptcy Act), are analogous to the instant case.

A ruling case is IN RE: E. H. WALSH, INC., 295 Fed. 504 (1923). There the Circuit Court of Appeals for the Second Circuit reversed the order of the District Court appointing receivers for a corporation of which receivers had been appointed by the State Court prior to the filing of a petition in bankruptcy. The court held that there could be no absolute necessity for the appointment of receivers under the circumstances of that case. Upon review the order of the District Court was reversed. In the opinion Judge Rogers said, after quoting Clause 3 of Section 2 of the Act above cited:

> "The court's jurisdiction to appoint receivers under the statute is thus confined to cases where the court 'shall *find it absolutely necessary for* the preservation of estates'. In the case of In re Spalding, which came before this court in May, 1905, and which has not been reported, this court said:
>
> > 'The fundamental error in the argument for the receiver and of the learned court below seems to be that both regard it as proper that a receiver should be appointed, practically as a matter of course, in every case where a petition in bankruptcy is filed. *That is not the law and it is not good sense.* The court has jurisdiction under the statute to appoint receivers only when it shall find it absolutely necessary for the preservation of estates. *The petition* upon which this receivership was granted not only fails to show that it was absolutely necessary, but *shows affirmatively that it was absolutely unnecessary, as it shows the prop-*

> *erty to have been in the custody of a receiver appointed by the Supreme Court of the State of New York, and there is nothing in the record to show that the state court receiver is not an entirely proper and competent person to preserve the assets. What could the federal receiver do under such circumstances? He has not title to any property. He is a mere custodian. He could not take the assets from the state court receiver. The bankruptcy court could not make any such order, and the assets could only be taken from the state court receiver by an application to the state court itself.* Furthermore, this appointment of receivers as of course is a great injustice to the bankrupt, in the event that the petition is not followed by adjudication; and it is wasteful and an unnecessary expense to the estate in the event that there is an adjudication. The papers on this application are wholly inadequate. The order is reversed, with instructions to vacate the receivership.' " (Italics supplied.)

In the instant case a participant of a mortgage pool, in the possession of the Secretary of Banking, is afforded all the freedom his interest requires. The Secretary of Banking is required to file an account in a State Court and if he unduly delayed, the Court could have cited him to show cause why an account should not be filed. After the account were filed any dissatisfied person could file exceptions, which would be adjudicated by the Court and which, in cases of mismanagement, could sur-charge the Secretary and his surety. No greater security can be procured in administration by Federal Receivers.

But if it were necessary to appoint a Federal receiver because of the maladministration of the Secretary of Banking, all that the Federal receiver could do would be to file a petition in a state court for the appointment of substi-

tuted trustees for the pools because that would be in conformity with the procedure set up in the Act of Congress, 36 Stats. 1104; U. S. C. page 876 which provides:

> "Whenever in any cause pending in any court in the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. . . . "

Under the Department of Banking Code of 1933, the Secretary of Banking, who was in possession, was required to file an account, and, if no party in interest had already done so, to apply for a substituted trustee (Section 904, Appendix page 60). This then is all that the Federal Receivers could do. They could not indefinitely operate the pool either under State or Federal Law.

We respectfully submit that the Federal Court cannot appoint a person whose duties, in either aspect, would be those of a trustee or a person who was to hold more or less permanently and administer property, and call him a receiver. In such a case it may well be said: "The voice is Jacob's voice, but the hands are the hands of Essau".

II. A Bill in Equity Naming the Secretary of Banking for the Commonwealth of Pennsylvania, a Defendant, and Which Has for Its Purpose the Substitution for the Secretary of Banking as State Receiver, of Federal Receivers, Is a Suit Against the State of Pennsylvania, and contrary to the Eleventh Amendment to the United States Constitution.

The Eleventh Amendment to the Constitution of the United States, which was adopted to render inoperative Section 2, Article 3, of the Constitution, as interpreted by this Court's decision in CHISHOLM v. GEORGIA, 2 Dallas (U. S.) 419 (1793), was ratified by the Legislatures of three-fourths of the States, on the 8th of January, 1798, and reads as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

Article 4, Sec. 1, of the Constitution of the State of Pennsylvania, reads as follows:

> "The Executive Department of this Commonwealth shall consist of a Governor, Lieutenant Governor, Secretary of the Commonwealth, Attorney General, Auditor General, State Treasurer, Secretary of Internal Affairs and a Superintendent of Public Instruction."

Article 2 of the "Administrative Code of 1929", April 9, 1929, P. L. 177, provides as follows:

> "The Executive and Administrative work of this Commonwealth shall be performed by the Executive

Department consisting of the Governor, etc. etc. etc. (and) by the following Administrative Departments: . . . Department of Banking."

Are the instant cases suits by citizens of a foreign state against the State of Pennsylvania?

The defendant in each case is HONORABLE WILLIAM D. GORDON, Secretary of Banking, and ROBERT G. FUNKHOUSER, Special Deputy in Possession of Chester County Trust Company. Only three things are possible:

1. That it is a suit against the State of Pennsylvania with an administrative officer as nominal defendant.

2. That is a suit against William D. Gordon and Robert G. Funkhouser, individually.

3. That it is a suit against William D. Gordon as Receiver in possession of the business and property of the Chester County Trust Company, in accordance with Section 601, Banking Code of 1933 of Pennsylvania.

The second of these possibilities needs no argument, for as an individual citizen, William D. Gordon would have no rights and/or powers over the Chester County Trust Company assets. Therefore, he is either in possession as an executive and/or administrative officer of the State, or as a Receiver appointed by State Law and subject to the authority of the Court of Common Pleas of Chester County.

The Secretary is appointed by the Governor of the State as a member of his Cabinet, and is the agent of the people of the State for the supervision and control, through the Governor, of banking institutions. His salary is fixed; he receives no commissions; and/or fees; and has no interest whatsoever of a personal nature in either going or

closed banking institutions. He is a vehicle for expressing, in an executive and administrative manner, the will of the people of the State of Pennsylvania, with regards to the administration and liquidation of closed banks. A suit against him in this capacity is a suit against the people of the State of Pennsylvania or the State of Pennsylvania, and cannot be maintained without the State's consent.

In Ex Parte Ayres, 123 U. S. 443; 31 L. ed. 216 (1887), a bill was filed by certain aliens against the Attorney General and the Auditor General of Virginia to restrain them from instituting certain suits under a state statute. It was held that this was a suit against the State of Virginia, even though the state was not named as a party. The court said (U. S. 505; L. ed. 229):

> "To secure the manifest purpose of the constitutional exemption guaranteed by the Eleventh Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a state by name, but those also against its officers, agents, and representatives, where the state, though not named as such, is nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."

The Court said in Fitts v. McGhee, 172 U. S. 516; 43 L. ed. 535 (1899), (U. S. 629; L. ed. 541):

> "As a state can act by its officers, an order restraining those officers . . . is one which restrains the state itself, and the suit is consequently as much against the state as if the state were named as a party defendant on the record."

The decree of the Court below in the present case interferes with one of the state's principal officers in the performance of his public duty imposed by an admittedly constitutional statute. The state is in effect being interfered with in its public duties just as much as if named a party to the suit.

In MURRAY v. WILSON DISTILLING Co., 213 U. S. 151; 53 L. ed. 742 (1909), this Court held that the United States District Court of South Carolina could not entertain a bill in equity for the appointment of a receiver to take over funds in the hands of the Liquor Commission, appointed by the state under an act of assembly for the purpose of liquidating the indebtedness of various liquor dispensers of the state. It was argued that the suit was against the Commission and not against the state. The court said:

> "The State is not only the real party to the controversy, but the real party against which relief is sought by the suit; and the suit is therefore substantially within the prohibition of the 11th Amendment. . . . An action will not lie in a case where a State officer is merely a nominal defendant and the State is the real party in interest."

In LANKFORD v. PLATTE IRON WORKS Co., 235 U. S. 460; 59 L. Ed. 316 (1915), suit was instituted against the members of the State Banking Board of Oklahoma to compel them to collect and to make payment to the petitioners of their share of the State Bank Guaranty Fund. It was held that the suit in effect was against the state and that therefore the court had no jurisdiction.

In the present case, likewise, the funds which it is sought to obtain, are trust funds in the hands of the State for administration.

With equal effect we might refer to the opinion of the Trial Judge in UTAH CONSTRUCTION COMPANY v. STATE HIGHWAY COMMISSION, 16 F. (2d) 322 (D. Wyo. 1926), where he states, at page 325:

> "In Hopkins v. College, 221 U. S. 636, at page 642, 31 S. Ct. 654, 656, 5 L. ed. 890, 35 L. R. A. (U. S.) 243, the Court says:
>
> "'And lacking other form to sustain, the Eleventh Amendment has been held to apply not only where the State is actually named as a party defendant, on the record, but where the proceeding, though nominally against an officer, is really against the State, or is one to which it is an indispensable party. No suit, therefore, can be maintained against a public officer which calls to compel him to exercise the state's power of taxation or to pay out its money in its possession on the State's obligation, or to execute a contract, or to do any affirmative act which affects the State's political or property rights.'"

In the UTAH CONSTRUCTION COMPANY case the State of Wyoming, by constitutional amendment, was authorized to go into the road-building business, and in proceeding to carry out this new foundation, it created the commission which was to act as its agency as to that matter. The Court held that a suit against the commission was, in effect, a suit against the State of Wyoming.

So, too, in the instant cases, the Commonwealth of Pennsylvania, under its general powers to legislate and control for the good and welfare of its general populace, has provided for the supervision and control of its quasi-public institutions through its own offices. The Legislature has provided that these functions, which are within the State's powers, are to be carried out through its designated

agencies, the Department of Banking and its Administrative Head, the Secretary of Banking. In these cases the defendants are only parties because of their official positions and, upon ceasing to hold office, their successors would be substituted as representatives of their Government. The defendants are not charged with any personal act detrimental to the plaintiffs, nor are they charged with acting under an unconstitutional statute. The charges against them, however, are against them as the representatives of the Commonwealth of Pennsylvania, in the exercise of its power to control its quasi-public institutions.

III. The Secretary of Banking, When Sued in His Official Capacity as a Receiver of a Closed State Bank, Is Not a Citizen of That State Within the Meaning of Section 24 of the Judicial Code, as Amended by the Act of March 3, 1911, c. 231, 36 Stat. 1091, 28 U. S. C. A., Sec. 41 (1).

Article 3, Section 2, of the Federal Constitution reads:

> "The judicial power shall extend in all cases in law or equity arising under this Constitution . . . between *citizens of different states.*"

The Jurisdiction of the District Courts has been limited to suits between citizens of different states in Section 24 of the Judicial Code, as amended by the Act of March 3, 1911, c. 231, 36 Stat. 1091, 28 U. S. C. A. Sec. 41 (1).

Numerous cases have decided that a suit by one citizen against an executive or administrative officer of another State, or against the State, does not create a diversity of citizenship, because an executive State officer sued in his official capacity is not a citizen of any State within the meaning of the diversity of citizenship doctrine.

In Westbrook v. Director General of Railroads, 263 Fed. 211 (1920), it was held:

"When sued officially, neither the officer nor the Government is a citizen of any State. No jurisdiction on account of diverse citizenship exists in these cases."

In HERTZ v. KNUDSON, 6 F. (2d) 812 (C. C. A. 8, 1925), the Court held that where, under statutory authority a department of the State Government takes possession of an insurance company, the department may not maintain suit in the Federal Court because a suit by the Department or by an officer in its behalf, is a suit by the State and that a Federal District Court is without jurisdiction in such matters.

It is significant that Section 601 of the Department of Banking Code of 1933 provides that:

"Whenever the Department takes possession . . . the Secretary shall by operation of law, simultaneously take over such possession from the Department and become receiver . . ."

The comments of the Attorney General of Pennsylvania upon this section, which appear in Pennsylvania Banking and Building and Loan Codes (1933) at page 38, are:

"1. . . . It seems necessary under the general plan of drafting all legislation now in force in this Commonwealth, under which powers and duties are respectively granted to and imposed upon Departments, rather than upon the officers in charge of such Departments. Consequently, the power to take possession is vested in the Department. However, *it is difficult to conceive of the Department as a receiver. It is, therefore, provided, that when the Department takes possession, the Secretary shall, by operation of law, simultaneously take over possession and become receiver.*"

We must mark the fact that the Department of Banking Code of 1933 was drafted by the Attorney General, and it is evident from his remarks that the only purpose of the designation of the Secretary of Banking as a receiver is for purposes of personifying the administrative offices of the Commonwealth to which the liquidation of banks and trust companies is entrusted.

In UTAH CONSTRUCTION COMPANY v. STATE HIGHWAY COMMISSION (*supra*), the Court specifically stated that quite aside from any question of the Eleventh Amendment, the District Court had no jurisdiction, inasmuch as the suit was by a citizen of one State against an administrative agency of another State.

We submit that any action brought against the Secretary of Banking, by virtue of his position, is an action not against him but against the Department and the Commonwealth he represents and that such an action, therefore, may not be brought without its consent, or, even if brought with its consent, may not be brought in the District Court.

CONCLUSION.

These cases, GORDON, SECRETARY OF BANKING v. OMINSKY et al, October Term, 1934, No. 395, and COMMONWEALTH OF PENNSYLVANIA v. JOHN G. WILLIAMS, et al, October Term, 1934, No. 394, are the only decisions of United States Circuit Court of Appeals refusing to give effect to State Laws governing the method of liquidating quasi-public corporations. All of these cases were decided at about the same time. In the two last mentioned argument was heard by this Court on January 14, 1935, and in an opinion handed down on February 4, 1935, it was held that the District

Court abused its discretion in declining to relinquish possession. They involve the appointment of receivers for Pennsylvania building and loan associations.

These decisions reflect a complete change in the attitude of the Circuit Court of Appeals for the Third Circuit on this important subject. In the earlier cases, LYON v. MCKEEFREY, 171 Fed. 384 (1909), and O'NEIL v. WELCH, 245 Fed. 261 (1917), this same court gave strong expression to its belief that Federal Courts should support State systems for the organization, regulation, supervision and liquidation of quasi-public corporations. The former case dealt with a bank—the latter with an insurance company.

In the following cases, circuit courts of appeal reviewed the exercise of discretion by district courts in appointing receivers for quasi-public corporations or for certain assets of such corporations, and sustained the State authorities:

MITCHELL v. LAY, 48 F. (2d) 79 (1930) C. C. A., Ninth Circuit. Petition for Certiorari to U. S. Supreme Court denied, 283 U. S. 864 (1931).

BANK OF BAY BISCAYNE v. HANKINS, 42 F. (2d) 209 (1930) C. C. A., Fifth Circuit.

AMOS v. TRUST CO. OF FLORIDA, 54 F. (2d) 286 (1931) C. C. A., Fifth Circuit. Petition for Certiorari to U. S. Supreme Court denied. 285 U. S. 559 (1932).

In the following cases Federal receiverships were set aside even though the bill in equity had been filed before the state officer took possession of the quasi-public corporation's property and assets:

AMOS v. TRUST CO. OF FLORIDA, 54 F. (2d) (1931) C. C. A., Fifth Circuit. Certiorari refused. 285 U. S. 559.

MITCHEL v. LAY, 48 F. (2d) 79 (1930) C. C. A., Ninth Circuit. Certiorari refused, 283 U. S. 864.

In the following cases the Federal receivers were required to turn over to the state authorities the assets of a quasi-public corporation at the instance of the proper state officer. In all of them the district court was reversed.

LYON v. MCKEEFREY, 171 Fed. 384 (1909) C. C. A., Third Circuit, Judge Gray.

MITCHEL v. LAY, 48 F. (2d) 79 (1930) C. C. A., Ninth Circuit. Certiorari refused, 283 U. S. 864.

O'NEIL v. WELCH, 245 Fed. 261 (1917), C. C. A., Third Circuit.

LEE v. EDMUNDS, 66 F. (2d) 122 (1933) C. C. A., Fifth Circuit.

However, in the two cases last cited the Federal receivership was junior to a state receivership.

In WM. D. GORDON v. JOHN G. WILLIAMS et al., No. 394, October Term, 1934, decided by this court February 4, 1935, it was held that the District Court abused its discretion in refusing to relinquish possession of the assets of a quasi-public institution even though the bill in equity had been filed before the state officer purported to take possession under the Building & Loan Code. If, under such facts, it is an abuse of discretion to refuse to relinquish possession it is certainly an abuse of discretion for the court to have assumed jurisdiction in the instant case where the

state official had been in possession for a period exceeding six months.

Thus we find support for our position in the expressions of the Circuit Courts of Appeal of the Second, Third, Fifth, Sixth and Ninth Circuits.

Except for the present cases and the two other cases decided at practically the same time, there are no Circuit Court of Appeals decisions to the contrary in any circuit.

On principle we submit that the decree of the Circuit Court of Appeals should be reversed.

Its decision is in direct conflict with the decisions of other circuits the review of which has been refused by this Court. Its decision is opposed to the public policy of the Commonwealth of Pennsylvania; and its decision is opposed to the policy of this Court as enunciated in the case of Wm. D. Gordon v. John G. Williams et al.

The decision of the Circuit Court attempts to deprive the Commonwealth of Pennsylvania of its sole control of property exercised under State law through its authorized administrative officer and under the supervision of its courts and to seat nominees of the Federal Court in positions reserved exclusively by state law for state officers.

The Circuit Court of Appeals has wrongfully sustained the effort of the district court to frustrate the state's settled policy in regulating and liquidating quasi-public corporations and to interfere with a state officer in the discharge of his statutory duty.

Finally, notwithstanding the fact that the Secretary of Banking was functioning properly under Pennsylvania law the appointing Judge abused his discretion and violated fundamental principles of equity by appointing trustees, under the guise of receivers, later designated "temporary receivers," without allowing an answer to be filed,

without ascertaining the facts, without giving sufficient notice to the parties in interest, and upon mere averments which were plainly insufficient to justify the appointment of receivers.

For these reasons, we believe that the decree of the court below should be reversed.

Respectfully submitted,

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Appendix.

PERTINENT PARTS OF PENNSYLVANIA BANKING LAWS

I. Act of May 13, 1876, P. L. 161.

Section 27. That the auditor general after having notified such corporation that it has committed an act of insolvency, shall forthwith, with the concurrence of the governor, appoint a special agent at a compensation not exceeding ten dollars per day and necessary traveling expenses, who shall make immediate inquiry into the truth of such information, and make report thereon to the auditor general; and if the said special agent shall report to the satisfaction of the auditor general that such corporation has suspended payment of its liabilities he shall forthwith apply to the court of common pleas of the proper county, if in session, or if in vacation to the president judge of the district in which such corporation is located, to appoint a suitable receiver, who shall take immediate possession of the books, records, money, bills, bonds, notes, other evidence of indebtedness, and all the property of such corporation of every description, and hold the same for the creditors of the said corporation.

Section 29. That if any corporation under this act against which the auditor general shall have instituted proceedings on account of any supposed act of insolvency as prescribed in this act, such corporation may apply to any court of competent jurisdiction for an injunction on said auditor general to suspend all further proceedings against such corporation for insolvency, and such court after citing

the auditor general to appear and show cause why such writ should not be granted, the said court shall proceed to inquire if such corporation has actually suspended payment of its liabilities and continues such suspension, and for this purpose such court may direct an issue, if required by either party; and if after such inquiry such court shall discover such corporation has not suspended and does not continue to suspend payment of its liabilities, shall make an order enjoining the auditor general from all further proceedings against such corporation on account of the supposed act of insolvency on which such proceedings were instituted, and thereupon all the property and assets of such corporation shall be restored to it.

II. Act of February 11, 1895, P. L. 4.

Section 9. If from any examination of the papers, books and affairs of any corporation, with or without capital, the Commissioner of Banking shall have reason at any time to conclude that such corporation is in an unsound and unsafe condition to do business, or that its business or manner of conducting the same is injurious and contrary to the interests of the public, the Commissioner of Banking shall forthwith communicate the facts to the Attorney General who shall forthwith make application to the court of common pleas of the county of Dauphin, or to a law judge thereof, for the appointment of a receiver to take charge of such corporation's property and wind up its business. Such receiver shall proceed and wind up the business and affairs of said corporation under and subject to the orders of the court of common pleas aforesaid. Such court shall also approve the amount and security of the bond to be given by said receiver for the faithful performance of his duties:

Provided, however, That if the Commissioner of Banking shall at any time deem it necessary for the immediate protection of the depositors and other creditors of any such corporation, he may, after hearing before the Attorney General of the Commonwealth, (of which hearing the said corporation shall have notice,) appoint some suitable person as temporary receiver who shall first give to the Commonwealth a good and sufficient bond with two sureties to be approved by said Commissioner, conditioned for faithful performance of duty, and shall forthwith take possession of said corporation's property and business and retain possession thereof pending like proceedings, as aforesaid, which shall be forthwith instituted in the court of common pleas of Dauphin county, at which time the compensation of said receiver shall be fixed by said court. And said Commissioner of Banking, after having so appointed said temporary receiver, shall, (if he deems it safe and to the best for all interests concerned,) have power at any time to withdraw said temporary receiver and cancel his appointment and surrender possession of said corporation and its property to said corporation without further proceedings or order. Whenever a corporation which shall deny that there is a good reason for the institution of either of the proceedings, as aforesaid, or that its business should be closed, or that it should be dissolved, it shall forthwith file its answer in said court of common pleas of the county of Dauphin, or make application to said court, or the law judge thereof, and ask for an order to enjoin further proceedings in the premises; whereupon the said court, or law judge thereof, after hearing the allegations and proofs of the respective parties, shall make such order in the matter as the interest of the parties and that of the public may require.

III. The Banking Act of 1923, Act of June 15, 1923, P. L. 809, as Amended by Act of May 5, 1927, P. L. 762.

Section 22. *Certificate of Taking Possession.*—When the Secretary shall have duly taken possession of the business and property of a corporation or person as provided in section twenty-one of this act, he shall forthwith make, under his hand and official seal, a certificate setting forth that he has so taken possession, and shall file such certificate in his office, and cause a certified copy thereof to be filed in the office of the prothonotary, who shall index the same in the judgment index under the name of the corporation or person as defendant and the name of the Secretary as plaintiff.

From and after the filing of such certified copy in the office of the prothonotary, the Secretary shall supersede any receiver previously appointed by any court for, or any assignee or trustee for creditors appointed by, such corporation or person.

* * * * * * *

Section 23. *Injunction to Restrain Secretary.*—Whenever the Secretary takes possession of the property and business of any corporation or person, such corporation or person may, at any time within ten days, apply to the court for an order requiring the Secretary to show cause why he should not be enjoined for continuing such possession. * * *

Section 29. *Status and Powers of Secretary as Receiver.*—Except as herein otherwise provided, the Secretary shall, when he has taken possession of the business and property of the corporation or person, have all the rights,

powers, and duties of a receiver appointed by any court of equity in this Commonwealth; and he shall be vested, in his official capacity, with all the rights, powers, and duties of such corporation or person and with all the property of such corporation or person, including debts due, liens, or securities therefor, and rights of action or redemption, whether or not the property of such corporation or person, including debts due, liens, or securities therefor, and rights of action or redemption, are held in the name of such corporation or person, or in the name of some other corporation or person, but actually the property of the corporation or person of which, or of whom, the Secretary has possession.

He shall be the representative of the creditors of the corporation or person, and entitled, as such, to have vacated and set aside, for the benefit of the creditors, any judgment, execution, attachment, sequestration, payment, pledge, assignment, transfer, conveyance, or incumbrance, which could have been avoided by the creditors or any of them, or by which it is attempted to give any creditor unlawful preference over another.

He may, with leave of court obtained on petition after notice to all creditors of whom he has knowledge, surrender to the corporation or person any assets, including choses in action, whether the subject of pending proceedings or not, which are burdensome and of no advantage to creditors.

IV. Pertinent Parts of Department of Banking Code, Act of May 15, 1933, P. L. 565 (effective July 3, 1933).

1. General Provisions.

Section 2. *Definitions—A.* The following terms shall be construed in this act to have the following meanings,

except in those instances where the context clearly indicates otherwise:

* * * * * *

"Court"—the court of common pleas of the county in which the corporation or person has its principal or only place of business in this Commonwealth; or, where an institution of which the Secretary is receiver is concerned, the particular court in which the certificate of possession, as defined later in this act, is filed.

"Prothonotary"—the prothonotary of such court.

Section 601. *Taking Over Possession by Secretary as Receiver.*—Whenever the department takes possession of the business and property of an institution, the Secretary shall, by operation of law, simultaneously take over such possession from the department and become receiver of such institution, subject to the provisions of this act. His official title, when thus in possession of the business and property of an institution, shall be receiver of such institution.

Section 604. *Certificates of Possession; Filing.*—A. The Secretary, upon taking possession of the business and property of an institution as receiver, shall forthwith, under the seal of the Department, prepare in duplicate a certificate, to be known as the certificate of possession, setting forth that he has become receiver of the institution. It shall state the name of the deputy receiver whom the Secretary, pursuant to the provisions of this act, appoints to take charge of the affairs of the institution, and shall set forth the duties which he delegates to such deputy receiver. If the Secretary does not appoint a deputy receiver prior to the date of the filing of the certificate of possession, or if he appoints a new deputy receiver or an addi-

tional one, or if he adds to the duties of the deputy receiver, he shall prepare, in duplicate, and file a supplement to the certificate of possession.

B. The Secretary shall file the original certificate of possession and the original of any supplement thereto in his office in Harrisburg, and the duplicate certificate of possession and the duplicate of any supplement thereto in the office of the prothonotary. The certificate of possession filed in the prothonotary's office, and any supplement thereto, shall be listed in the judgment index in the name of the institution as defendant and of the Secretary as plaintiff.

C. In addition the Secretary shall, as soon as possible, file a certified copy of the certificate of possession, and of any supplement thereto, in the office of the recorder of deeds in each county in the Commonwealth, or with the proper official in any other state or country, in which any real property shall be situated which belongs to the institution or title to which is in its name, or upon which there is a mortgage or other lien which belongs to the instituton or title to which is in its name. Such copy shall be recorded in the current deed book, and shall be indexed in the grantors' index in the name of the institution and in the grantees' index in the name of the Secretary, or it shall be filed, indexed, or registered by whatever other method is provided by the law of the particular county, state, or country in which such real property is located.

Section 605. *Injunction to Restrain Secretary.*—Any institution of whose business or property the Secretary has taken possession as receiver, may, at any time within ten days after the Secretary has become receiver, apply

to the court for an order requiring the Secretary to show cause why he should not be enjoined from continuing as receiver. Service may be made in such action by serving the Secretary personally, or by leaving a copy with the deputy in charge of his office in the Department, or by serving the deputy receiver appointed by the Secretary to manage the affairs of such institution. The court shall, after a hearing upon the merits, either dismiss the application or order the Secretary to surrender to the institution possession of its business and property, but no such injunction shall issue where the Secretary has been appointed receiver by action of a court of competent jurisdiction, or by action of the institution itself, in accordance with the provisions of this act.

Section 606. *Power of Courts to Appoint Receivers.*—No court shall appoint anyone by the Secretary as receiver of an institution. Whenever any court, at the instance of a depositor, shareholder, or other person entitled by law to institute such proceedings, shall determine that a receiver shall be appointed, for any reason whatsoever, it shall appoint the Secretary as such receiver.

When thus appointed receiver by a court, the Secretary shall serve in the same manner and with the same limitations, and he shall have the same rights, powers, and duties, as when he becomes receiver by operation of law and without appointment by any court. No court shall impose upon the Secretary as receiver any duties or restrictions which are in conflict with the provisions of this act.

Section 701. *Status of Secretary as Receiver.*—Except as otherwise provided in this act, the Secretary, when he has taken possession of the business and property of an

institution, shall be responsible to the court in which the certificate of possession is filed, and not to any other court. His rights, powers, and duties shall be those of a general receiver appointed by any court of equity in this Commonwealth, except as such rights, powers, and duties are increased or limited by the provisions of this act. He shall be vested, in his official capacity, with all the rights, powers, and duties of such institution; with the title or the right to possession of all property to which the institution has title or the right to possession, including debts due, and liens and other security therefor; and with the institution's rights of action or redemption. This shall be so whether such property and debts due, such liens or other security therefor, or such rights of action or redemption, are held in the name of such institution, or in the name of some other corporation or person. He shall have power to execute in his name, as receiver, any instrument incident to the exercise of any power granted to or any duty imposed upon him as receiver of such institution.

The Secretary shall be the representative of the creditors of the institution and shall be entitled, as such, to have vacated and set aside, for the benefit of the creditors, any judgment, execution, attachment, sequestration, payment, pledge, assignment, transfer, conveyance, or encumbrance, which could have been avoided by any of the creditors, or by which one creditor is given an unlawful preference over another.

Section 709. *Power of Court to Make and Enforce Orders.*—The court in which the certificate of possession is filed shall sit as a court of equity. It shall have the power, upon petition of the Secretary, to make and enforce any appropriate order to enable him, with the utmost dis-

patch, to discharge his duties in connection with the business and property of any institution of which he has taken possession as receiver, pursuant to the provisions of this act.

The court shall grant to the party against whom the order is sought the right to appear, within ten days after notice is given, to show cause why the order should not be made. The court shall have the power, at the end of the ten-day period, ex parte if the other party does not appear to show cause, or upon the merits, if the party does appear, to issue the aforementioned order.

Note: The Department of Banking Code also provides for the sale of certain property, in some situations with leave of court and in some without leave, for compromises with leave of court, for accounting to the court and for distribution under order of court.

Section 802. *Secretary in Possession of Trust Department.*—B. The Secretary, when in possession of an institution as receiver, shall have all the rights, powers and duties which such institution had in its fiduciary capacity . . . and shall have the power to administer such estates.

2. MORTGAGE POOL PROVISIONS.

ARTICLE IX.

Secretary in Possession of a Mortgage or Security Pool or of an Asset in Which Undivided Interests Are Held.

Section 901. *Mortgage and Security Pools and Participations; Accounts.*—Whenever the Secretary shall have filed a supplement to the certificate of possession, setting forth his determination to liquidate the affairs of an in-

stitution of which he is in possession as receiver, he shall, as soon as it may be convenient, file, in the court in which the certificate of possession shall have been filed, an account as to any mortgages, securities, or other assets comprising any mortgage or securities pool operated by such institution, or as to any mortgage, security, or other asset, in which undivided interests shall have been created by the institution, regardless of whether certificates of participation in such mortgage or securities pool, or in such mortgage, security, or other asset shall have been actually issued by the institution, and regardless of whether the relation of the institution to the owners of the undivided interests in such mortgage or securities pool, or in any such mortgage, security, or other asset, is technically that of a trustee.

A mortgage or securities pool shall be regarded as having been operated by the institution, regardless of whether any or all of the mortgages, securities, or other assets in such pool shall be held in the name of the institution or in the name of the nominee of the institution. Where undivided interests have been created in any mortgage, security, or other asset by any corporation or person holding such mortgage, security, or other asset as nominee of the institution, such undivided interests shall be regarded as having been created by the institution.

The prothonotary shall not be under any duty to recopy or otherwise record any such account filed by the Secretary. He shall make no charge except the regular fee for filing such or similar papers.

Section 902. *Transfer of Pools and Participations Without Filing an Account.*—If all the corporations or persons who are the owners of all the undivided interests in

any mortgage or securities pool, or in any mortgage, security, or other asset in which the institution shall have created undivided interests, are sui juris, and if they shall agree to the amount asserted by the Secretary to be due him as receiver for services rendered by the institution or by him, and for expenses incurred by either, and if they shall authorize the Secretary to transfer any such mortgage or securities pool, or any such mortgage, security, or other asset to them, or to a substituted fiduciary or to any other corporation or person agreed upon by them, and if they shall execute proper instruments releasing the Secretary and the institution from any further liability to them, the Secretary may transfer to such substituted fiduciary or to such corporation or person, without filing an account, all the mortgages, securities, or other assets comprising such mortgage or securities pool or the mortgage, security, or other asset in which undivided interests have been created. In any case where the institution, as fiduciary of an estate, is the owner on behalf of such estate of any undivided interest in any such mortgage or securities pool, or in any such mortgage, security, or other asset, and no substituted fiduciary has been appointed for such estate, the Secretary shall not transfer such mortgage or securities pool, or such mortgage, security, or other asset in which undivided interests were created by the institution, unless he shall also be authorized to make such transfer by all corporations or persons having an interest in the estate of which the institution was fiduciary, except that where substituted fiduciaries have not been appointed for unborn beneficiaries of the estate or for other beneficiaries who are not sui juris, the Secretary shall not be required to obtain such authority from anyone in behalf of such unborn beneficiaries or other persons who are not sui juris.

Section 903. *Notice of Filing Account.—A.* Upon filing an account as to any mortgages, securities, or other assets comprising any mortgage or securities pool operated by an institution of which he is in possession as receiver, or as to any mortgage, security, or other asset in which the institution shall have created undivided interests, the Secretary shall give notice thereof, in so far as it may be practicable, to all corporations or persons who are the owners of the undivided interests in any such mortgage or securities pool, or in any such mortgage, security, or other asset, and, in any case where the institution as fiduciary of an estate, is the owner on behalf of such estate of any such undivided interest, then to all corporations or persons having an interest in such estate, except that no such notice need be given to anyone on behalf of unborn beneficiaries of such estate or other beneficiaries who are not sui juris, where no substituted fiduciary has been appointed for such beneficiaries. Such notice shall be given to the corporations or persons entitled thereto under this section, at their addresses as they appear on the books or other records of the institution, or, if the address of any such corporation or person does not appear thereon, then at the last known address of such corporation or person.

B. Such notice shall state the time and place of the audit of such account, and, except where an application for a substituted fiduciary shall have been made by any other method authorized by this act, it shall also state the intention of the Secretary to apply for a substituted fiduciary for such mortgage or securities pool, or for such mortgage, security, or other asset in which undivided interests were created by the institution, and the time and place of any hearing upon such application which may be fixed by the court.

Section 904. *Appointment of Substituted Fiduciary; Transfer of Pools or Participations upon Order of Court.* —*A.* After the filing by the Secretary of a supplement to the certificate of possession, setting forth his determination to liquidate the business and property of an institution, but either before or after the filing of an account by him as to any mortgages, securities, or other assets comprising any mortgage or securities pool, operated by such institution, or as to any mortgage, security, or other asset in which the institution shall have created undivided interests, the owner of any undivided interest in such mortgage or securities pool, or in such mortgage, security, or other asset, may file, in the court in which the certificate of possession is filed, a petition for the appointment of a substituted fiduciary for such mortgage or securities pool, or for such mortgage, security, or other asset in which undivided interests were created.

If such petition shall not have been filed by the owner of any such undivided interest within thirty days after the notice by the Secretary of the filing of an account as to such mortgage or security pool, or as to such mortgage, security, or other asset, the Secretary shall file, in the court in which the certificate of possession is filed, a petition for the appointment of a substituted fiduciary for such mortgage or securities pool, or for any such mortgage, security, or other asset in which undivided interests were created by the institution.

Upon the filing of such a petition by the owner of any such undivided interest, or by the Secretary for such mortgage or security pool, or for such mortgage, security, or other asset in which undivided interests were created by the institution, the court shall, upon a day fixed by it, con-

duct a hearing upon such application, after which it shall appoint a substituted fiduciary.

B. The Secretary shall transfer to the substituted fiduciary appointed by the court all such mortgages, securities, or other assets comprising any such mortgage or securities pool, or any such mortgage, security, or other asset in which undivided interests were created, as are in his possession as receiver, and as to which he shall have filed an account. The substituted fiduciary shall take such mortgages, securities, or other assets without liability for the nature or value of the mortgages, securities, or other assets as investments. Such transfer shall be made in accordance with the order of the court, and, in directing such transfer, the court may reserve for future determination any question of surcharge against the institution or the Secretary.

The court may, after petition filed pursuant to the provisions of this section, order the Secretary to make such transfer even prior to filing an account, in which case it may also reserve for future determination any question which may arise upon the audit of the account.

Section 905. *Advances by Secretary to Substituted Fiduciary.*—Whenever the Secretary shall have filed an account as to any such mortgage or securities pool, or as to any mortgage, security, or other asset in which the institution shall have created undivided interests, and it shall appear to the court that any sum of cash will be needed by the substituted fiduciary for the protection of the owners of undivided interests in such mortgage or securities pools, or in any such mortgage, security, or other asset, as to which such account shall have been filed, and if it shall appear from the account that the Secretary does not have any cash held by him in connection with such mort-

gage or securities pool, or in connection with any such mortgage, security, or other asset, or if the account discloses that the cash in his hands for that purpose is insufficient for the protection of the owners of the undivided interests in such mortgage or securities pool, or any such mortgage or security, or other asset, or where no account is filed, if the Secretary shall demonstrate these facts to the satisfaction of the court, the court may, upon petition of the Secretary, and in the exercise of its discretion, order the Secretary to advance to the substituted fiduciary, out of the general assets of the institution, such cash as may be necessary for the protection of the owners of such undivided interest. Such order shall provide that the amount of cash so advanced by the Secretary shall be repaid by the substituted fiduciary out of the first moneys realized by such substituted fiduciary on the mortgages, securities, and other assets transferred to him.

Section 906. *Compensation and Expenses.*—The court, in its adjudication of any account filed by the Secretary as to any mortgage or securities pool operated by an institution of which the Secretary is in possession as receiver, or as to any mortgage, security, or other asset in which the institution shall have created undivided interests, shall award to the Secretary such compensation for services rendered and expenses properly incurred by the institution, or by the Secretary, as the court shall deem reasonable and proper under all the circumstances. The order of the court in making any such award to the Secretary shall provide for the payment of such compensation or expenses out of any cash included in the account, or if there be no cash in the account, or if the amount of cash included therein is insufficient to pay the amount awarded to the

Secretary, the order shall provide for the payment of such compensation or expenses out of the first moneys realized by the substituted fiduciary on the mortgages, securities, or other assets so transferred to such substituted fiduciary. All sums received by the Secretary under this section shall become assets of the institution of which he is in possession as receiver.

When the court shall, pursuant to the provisions of this act, order the Secretary to transfer such mortgages, securities, or other assets, prior to the filing of an account, it shall similarly make provision for the payment of the compensation earned, or the expenses incurred, by the institution, or by the Secretary.

IN THE

Supreme Court of the United States

No. 549. October Term, 1934.

WILLIAM D. GORDON, Secretary of Banking, and ROBERT G. FUNKHOUSER, Special Deputy as Agent in Possession of Chester County Trust Company,
Petitioner,

v.

LAURA A. WASHINGTON, Complainant, and EDWARD W. WELLS and RICHARD F. ENNIS, Receivers of Trust Fund Mortgages Aggregating $2,901,236.01,
Respondents.

I. THE FACTS.

The court is respectfully referred to the Brief contra petition for certiorari in William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company, Petitioners v. Mary A. O'Brien, Complainant and John Hemphill and J. Louis Breitinger, Receivers of Trust Fund Mortgages, aggregating $1,742,404.91, Respondents.

The complainant in the instant case is Laura A. Washington, a citizen of Connecticut, and the holder of a participating certificate for $40,000.00 in the trust fund mortgages, aggregating $2,901,236.01.

II. COUNTER STATEMENT OF QUESTIONS INVOLVED.

The court is respectfully referred to the Brief contra petition for certiorari in William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company, Petitioners v. Mary A. O'Brien, Complainant and John Hemphill and and J. Louis Breitinger, Receivers of Trust Fund Mortgages, aggregating $1,742,404.91, Respondents. Therein the issues as presented in Petitioner's Brief is re-stated.

III. ARGUMENT.

The court is respectfully referred to the Brief contra petition for certiorari in William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company, Petitioners v. Mary A. O'Brien, Complainant and John Hemphill and J. Louis Breitinger, Receivers of Trust Fund Mortgages, aggregating $1,742,404.91, Respondents.

The facts of the two cases are substantially alike (R. 4). The differences being these:—Here complainant is a citizen of the State of Connecticut and the amount of the mortgage pool is $2,901,236.01. Both the District Court and the Circuit Court of Appeals wrote one opinion covering both cases.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 550. October Term, 1934.

WILLIAM D. GORDON, Secretary of Banking and ROBERT G. FUNKHOUSER, Special Deputy as Agent in Possession of Chester County Trust Company,

Petitioners,

vs.

MARY A. O'BRIEN, Complainant, and JOHN HEMPHILL and J. LOUIS BREITINGER, Receivers of Trust Fund Mortgages Aggregating $1,742,404.91,

Respondents.

ARGUMENT.

ANSWER TO ISSUES AS PRESENTED IN THE PETITIONERS' BRIEF AND FACTS.

In an attempt to meet the arguments presented in Petitioners' Brief this responding argument may appear somewhat voluminous. This was necessitated by the unusual highways traversed by the facile pen of the Petitioners.

In a last desperate attempt to secure a ruling compatible with the wishes of the Department of Banking, Petitioners have resorted to arguments calculated to de-

tract from the real question at issue. The Petition and argument misquotes the record; misstates the conclusions of the Circuit Court of Appeals unjustly; casts slurs on the District Court; artfully selects for argument purposes the case in which the complainant has the smallest participating interest, disregarding the $40,000.00 interest of the complainant in the companion suit; subtly prints the petition to intervene as a part of the record filed in the Circuit Court of Appeals by lawyers representing other interests, who would undoubtedly benefit by appointment of their own suggested Receivers (although up to the present time a copy of this petition has not been served on the respondent, Receivers or their counsel, *nor has the right to intervene even been allowed by the Circuit Court*); refers in like vein, to a futile decree handed down on a legal holiday—Labor Day—by the Common Pleas Court of Chester County in defiance of the mandate of the Federal Court (Petitioners' Brief P. 20); presenting a fictitious issue of interference with the performance of the duty of the State officers, and conjures ill omens and dire consequences if the appointment of Receivers is sustained; insinuatingly makes reference to the cases of the Commonwealth of *Pennsylvania vs. John G. Williams et al October Term, 1934, #394, and Gordon, Secretary of Banking vs. Joseph Ominsky et al October Term, 1934, #395,* in which certioraris were granted by the Supreme Court—as if there was any similarity between those cases and this (Petitioners' Brief P. 10); interchangeably employs the name of the Secretary of Banking in possession of the Trust Company, who is the real defendant, with the Commonwealth of Pennsylvania, as if the State of Pennsylvania were the defendant,—and all to what purpose? Not that the Secretary of Banking shall administer the mortgage pool until final liquidation, for that he has no right to do under the statutes which he invokes, but that the Receivers of the Federal Court may be ousted and the Chester County Court

appoint Receivers at the instance of other attorneys or certificate holders. Elsewhere in this Brief will be found the specific references to the Record and Petitioners' Brief where these abuses appear.

Is this the duty of a State officer? For whose benefit, have the dilatory tactics utilized so far been employed? Not for the poor certificate holders who are still waiting for results of their investment. Not for the State of Pennsylvania, which has no interest in this pool? Why not frankly face the facts and argue the single question involved: viz: *since the Secretary of Banking cannot, under the State statutes continue to liquidate and administer the mortgage trust pools and since Receivers must be appointed, Should the Federal Courts, having first obtained jurisdiction, or the local County Court appoint the Receivers?* Even a reference to the Petition to Intervene (R. 107) shows this to be the only question. Therein Petitioner concludes:

> "Your Petitioners, therefore, believing that it will be greatly to their advantage to have this pool *administered under the jurisdiction of the Court of Common Pleas of Chester County, and by a receiver or receivers appointed by said Court.* . . ."

Obviously, lawyers of Chester County representing other certificate holders who do not represent the Federal Receivers would prefer the local courts to appoint Receivers suggested by them. But of what benefit is that to the Banking Department or to the State of Pennsylvania—or, of what concern is it in this argument? Reference by the Petitioners to the Petition to intervene actually propounds this question: Where a Federal Court has appointed receivers at the instance of a small representation of a mortgage pool and thereafter a larger group suggests that they

would have a State Court appoint receivers, should the Federal Court relinquish its jurisdiction? This type of race for jurisdiction is the very thing the Courts have sedulously avoided. This is the type of litigation contrary to public policy and yet clearly is presented by the Petitioners.

In truth and in fact, the Banking Department would be best served by the immediate surrender to the Federal Receivers of the Mortgage Trust Pool. This should have been done many months ago, even as the Secretary of Banking should have divested himself of the Trust Pool months prior to the filing of the Bill for the appointment of Receivers, and devoted himself to his duty to liquidate the assets of the Bank for the benefit of the depositors. For under the Act of 1923, under which Act he took possession, the Secretary of Banking, when he has determined to liquidate the assets of a Bank is directed to give the beneficiaries written notice to apply within thirty days for the appointment of a substituted fiduciary and in the event they neglect to do so, then the Secretary must himself apply for such appointment. (Quoted in full in Appendix at Page 32.) And under the Act of 1933, at any time before or after the Secretary of Banking files an account of the mortgage pool, a substituted fiduciary in his place may be appointed; and he is compelled, within thirty days after the filing of his account, to himself apply for a substituted fiduciary in the event that no beneficiary has so acted. True, it is that the Act says he is to file his account "at his convenience", but that must mean within a reasonable time after he has taken possession. He cannot unreasonably hold up the filing of an account of the pool in order to continue liquidating such funds. *But regardless of his filing an account of the pools—any participant even under the Act of 1933 may at any time come in and ask for the appointment of a substituted fiduciary.*

Considerable confusion is created by the Petitioners'

Brief in its reference to the Building and Loan Cases heretofore mentioned. Since these cases are not analogous, for what purpose is reference made to them so strenuously? The inference is clear. In those cases, the Petitions for writs of certiorari were granted and the inference is that the same conclusion should be reached in the present case. But the issues in both cases are entirely different from those here involved. In the Building and Loan cases, the *contest is between the Secretary of Banking and the Federal Receivers for the right to liquidate the assets of the Association.* In the case at bar, the general assets of the Trust Company are not involved. The Secretary of Banking continues without interference to administer the assets. IT IS ONLY THE MORTGAGE TRUST POOL WHICH HE MUST SURRENDER TO THE RECEIVER IN WHICH HE HAS NEITHER RIGHT NOR INTEREST—FOR THE VERY STATUTES UNDER WHICH THE SECRETARY OF BANKING TOOK POSSESSION AND WHICH DETERMINED HIS DUTIES AND OBLIGATIONS SPECIFICALLY COMMAND HIM TO SURRENDER THE POOL TO ANOTHER FOR PURPOSES OF ADMINISTRATION.

Petitioners' Brief presents a further confusion in its reference to the fact that if the appointment of the Receivers is sustained, it will mean the taking of assets bodily away from the Banking Department. But that is no issue, for this is a daily occurrence in the administration of trust estates held by closed banks, or banks in liquidation by the Secretary of Banking. In Philadelphia County and elsewhere trust funds have frequently been bodily taken from the Secretary of Banking in possession of a closed bank which is being liquidated—and at no time has the Secretary of Banking raised a similar objection—that funds are bodily being taken from him.

Moreover, there is no Federal question involved in

the instant case. Suits against the Secretary of Banking are continuously brought in the State and Federal courts and no one has ever claimed such action to be in violation of the Eleventh Amendment. It is sheer sophistry to contend that the Secretary of Banking in possession is only nominal defendant and, the State, the real party in interest, when the State hasn't the slightest interest in the proceedings; when the State has no property interest to protect and when the official involved is an administrative officer and not an arm of the executive branch of the State government. On the contrary, this Petition by the Secretary of Banking in possession is detrimental to the State, in the sense that a mere administrative official, overwhelmed by a title and influenced by the "magic of words", which he elsewhere derides, enters the highest Tribunal of the United States, with a proclamation "I am the State".

In addition to confusing the issue by the presentation of facts incorrectly stated and inferences unfairly drawn, there is also a serious omission. The Petitioners have carefully avoided directing the attention of this Court to the provisions of the statutes which give a participant in the mortgage pool the right at any time to ask for the appointment of a substituted trustee, both by the Act of 1923, under which the Secretary of Banking took possession and as well under the Act of 1933.

It is respectfully submitted that when these statutes were called to the attention of the District Court at the hearing held September 26, 1933 (R: 63), counsel also called attention to the comment of the Attorney-General, printed in the analysis of the Act of 1933, as follows:—

> "The owner of an undivided interest in any mortgage or securities pool or in a special mortgage securities pool probably has the right to ask for a substituted fiduciary at any time."

We have endeavored by way of introduction to point out inaccurate and irrelevant references in Petitioners' Argument and to indicate the confusion which might arise from the presentation of facts and questions as outlined in the Petitioners' Brief.

FACTS.

On August 25, 1933, the complainant, a citizen of the State of New Jersey and a participant in the Mortgage Pool filed a bill for the appointment of a Receiver in the District Court of the United States for the Eastern District of Pennsylvania, naming as defendants the Secretary of Banking and his Deputy, who were in possession of the general assets of the Chester County Trust Company and in custody of a certain Mortgage Trust Pool since February 14, 1933. The bill alleged that the assets of the bank were being liquidated; that as to the Mortgage Trust Pool, since that latter date interest on the mortgages and taxes on much of the real estate securing the mortgages was unpaid and that little effort was being made by the Secretary of Banking to compel the payment of the same, and that the certificate holders were receiving no returns for their investment, nor could they ascertain their equity in the same since the Secretary of Banking had failed to file an account of the mortgage pool.

On the same date, to wit, August 25, 1933, complainant filed a motion for the appointment of a Receiver. Pending hearing on the bill and answer, the Court fixed five days later for the hearing and due service was made of said bill, motion and notice of hearing by the U. S. Marshal. *However, on the day fixed for the hearing, the defendants failed to appear and at the instance of the Court, the attorney for the Banking Department was telephoned by the Clerk of the Court and later appeared and vigorously opposed the appointment of Receivers.* No answer was filed by the Secretary of Banking, though practi-

cally requested to do so by the Court (R. 64), nor was any answer ever filed subsequent thereto.

The Court appointed Receivers, but inadvertently omitted the word "temporary", which excusable error was corrected by an Order filed September 22, 1933, (R. 55). This correction, it may well be argued was unnecessary for the appointment of the Receivers having been made before the defendant filed his answer, the appointment could only be effective until hearing on Bill and Answer.

On Labor Day of 1933, immediately after the appointment of Receivers by the Federal Court and after service of the Decree of the United States District Court and after demand for the surrender of the Mortgage Pool was made, and surrender refused by Petitioners, an injunction issued from the Common Pleas Court of Chester County at the instance of Chester County lawyers representing another certificate holder, without notice to the Federal Receivers, restraining the Secretary of Banking from turning over any of the assets of the bank to the Federal Receivers. Contempt proceedings were instituted but not pressed by counsel for Complainant.

Hearings were thereafter had by the District Court to give opportunity to others in interest to appear, and show cause, if any they have, why the Receivers should not be appointed, but no one appeared other than the Deputy Attorney-General. At that time, lawyers representing other certificate holders were in Court. These are the complete facts in the case. The only question presented and argued before the Lower Courts and *pertinent* here, involved the status of the Secretary of Banking as a statutory Receiver, the particular limitations placed upon the mortgage trust pool; and the rights of courts having concurrent jurisdiction and Petitioners attempt to invoke the 11th Amendment, which we respectfully submit is irrelevant.

(a) COUNTER-STATEMENT OF THE QUESTIONS INVOLVED.

The questions as stated in Petitioners' Brief do not present a sincere statement of the problem of this case. Accordingly, a counter-statement of the questions involved follows:

1. Where a bank, in the State of Pennsylvania, operating a mortgage pool has been taken over by the Secretary of Banking on account of insolvency and which bank he has determined to liquidate, and under the statutes of the State, the mortgage pool is kept separate and apart from the other assets of the bank, and the Secretary is directed to divest himself of the pool, can a non-resident of the State of Pennsylvania, a participant in the mortgage pool, proceed in the United States District Court to have a substituted fiduciary or Receiver appointed for the pool?

2. Can a State statute, providing that a substituted fiduciary of a mortgage pool shall be appointed by the State Court, deprive a citizen of another State of his equitable rights in a Federal Court?

II.

THE COMMONWEALTH OF PENNSYLVANIA HAS NO INTEREST IN THE MORTGAGE TRUST FUND, THE SECRETARY OF BANKING BEING A MERE ADMINISTRATIVE OFFICER, HAVING CUSTODY, BUT NOT EXCLUSIVE POSSESSION NOR CONTROL OF THE MORTGAGE TRUST FUND.

Neither by any legal concept, nor by any logical conclusion can such control and exercise of jurisdiction over the Mortgage Pool involved in the instant case be found in the Common Pleas Court of the State of Pennsylvania,

so as to preclude the exercise of jurisdiction by the United States Court. Both the status of the Secretary of Banking as a Statutory Receiver and the particular qualifications placed upon the Pool in question render the Petitioners' contention of exclusive possession an impossibility. Incidentally under the Act of 1923, under which the Secretary took possession of the bank, he was not even called a Receiver—his title then was "Secretary of Banking in Possession" of the particular bank. It was only by the Act of 1933 that the statutes renamed him a Receiver.

An analysis of the Act of June 15, 1923, P. L. 809, the Banking Act in effect at the time the Secretary of Banking took possession and the subsequent Act of May 15, 1933, P. L. 565, which went into effect on July 3, 1933, yield a double conclusion:—

1. The Mortgage Trust Pool is only in the temporary custody of the Secretary of Banking, who is specifically ordered and directed to divest himself of it.

2. The Secretary of Banking is only a "Receiver" in nomine, having none of the powers of an Equity Receiver with the corresponding obligations which would subject him to the jurisdiction of the Court of his appointment.

At the time of the taking of possession of the Chester County Trust Company by the Secretary of Banking, whatever powers may have been conferred upon him under the Banking Act of 1923, *as to his control of the general assets of the Bank,* or whatever his duties were in respect to those assets *is immaterial in this argument. We are only concerned with his duties in relation to the Mortgage Pool.* The issue then isolates itself, not to the irrelevant question of interference with the Secretary of Banking in his administration of the general assets of an institution, but to the issue of control of the specific Mortgage Pools. For, after the appointment of a substituted fiduciary for such pools as is required by the Banking Acts, divesting the

Secretary of Banking of the temporary custody of such pools, he *still continues to administer the assets of the Trust Company without interference by the fiduciaries appointed for the Mortgage Pool.*

The Act of 1923 provides specifically what the Secretary of Banking is to do with these Pools, when he has taken possession of the general assets of a banking institution. Section 40 of this Act (quoted in full at Page 32 in the Appendix to this Brief), *provides in substance that a Mortgage Pool is a Trust Fund and forms no part of the general assets of a bank and is to be kept separate and apart from the other assets of the bank, by the Secretary of Banking, who is given preliminary custody thereof, with a clear and specific direction to divest himself of this fund.*

The later Act of 1933 similarly segregates trust funds after the Secretary of Banking has taken possession of an insolvent bank. By Section 801 of this Act, under the general heading of "Secretary in Possession of Trust Department" it is provided:

> "Section 801. Institution as Fiduciary.—References in this act to funds, property, or investments held in a fiduciary capacity by an institution of which the secretary has taken possession, shall apply only to funds, property, or investments held in such fiduciary capacity by the trust department of such institution, and shall not apply to funds, property or investments which were held by the commercial department of such institution."

In sub-section B of section 40 of the Act of 1923, a limitation on the administration of such Mortgage Pools, is definitely imposed upon the Secretary of Banking inasmuch as he is ordered to notify all the beneficiaries to apply for a substituted fiduciary, the Trustee Bank being insolvent and in liquidation. And even further, it is pro-

vided that the Secretary may turn over the fund to a substituted fiduciary, selected by the agreement of all the beneficiaries. *Such fund may be turned over without the filing of a formal petition for the appointment of a substitute, and moreover, without any judicial approval.*

While the Act of 1933 provides that substituted fiduciaries may be appointed before or after the Secretary of Banking has filed his account, it further specifically provides in Section 904-B (quoted in Appendix at P. 36) as follows:

> "... *The court may, after petition filed pursuant to the provisions of this section, order the secretary to make such transfer even prior to filing an account,* in which case it may also reserve for future determination any question which may arise upon the audit of the account. ..."

The obvious intention evidenced by statutory direction of the Legislature was to provide for the speedy surrender of all Trust funds so as to leave the Secretary of Banking free to liquidate the general assets of the bank for the benefit of the depositors, *but definitely to exclude the Secretary of Banking from himself administering the same.* In the instant case, the Secretary of Banking failed and neglected to notify the beneficiaries to apply for the appointment of a substituted Trustee as he was duty bound to do under the Act of 1923. The Petitioners attempt to justify this stand by stating (Page 22, Petitioners' Brief) that the secretary may apply for the appointment of a substituted Trustee only if no application is made by a beneficial owner within thirty days after the filing of his account. This ignores his dereliction under the Act of 1923 and ignores the right of a substituted fiduciary to be appointed at any time on Petition of a participant of the pool. Clearly, this is an attempt to cloud the issue, for this provision of the Act is intended to take effect only if

no one applies for the appointment of a Receiver after the Secretary has given them formal notice to do so. Moreover, is this argument valid? When is the Secretary of Banking to file his account? The Act states "at his convenience", but unquestionably such a clause cannot be used in justification and excuse for the neglect and failure of the Secretary of Banking to act between the 14th of February, 1933, and the 25th of August, 1933—nor until the present day.

No substantial change is made in the Banking Act of 1933, which became effective on July 3, 1933. The jurisdiction of the Secretary is not enlarged. On the contrary, this Act includes a number of sections headed "Mortgage Pools" and by Section 904, (quoted in full in the Appendix), the Secretary is specifically directed to divest himself of these pools by making application for that purpose. What then, is the statutory power and duty of the Secretary of Banking as to these assets? It is submitted that these conclusions follow:

That after the Secretary of Banking has filed his certificate of possession, which is a mere notification of his intention to enact his statutory duty, he must notify all the beneficiaries that it is their right to apply for a substituted fiduciary to administer these funds, and if all the beneficiaries should come to him with their nominee, he must divest himself of this fund in favor of such person, and this he may do without the consent of any Court. If, however, no beneficiary should avail himself of the right of demanding a substitute fiduciary, then the Secretary is compelled, within thirty days after he has filed his account, to request the appointment of such a substituted fiduciary. That, finally, *this account must be filed within a reasonable time.* In other words, in no event is the Secretary of Banking to administer these funds to a finality. His possession is a mere naked custody, which cannot possibly be construed as giving such constructive control and dominion

to the Court, in which he has filed his certificate of possession as to exclude the United States Court from exercising jurisdiction.

It is the contention of the Petitioners that the Banking Code, which went into effect six months after he took possession of the bank, has made the Secretary of Banking in possession of the Trust Company a "Receiver" and has subjected him to the jurisdiction of a particular State Court, and, therefore, the United States Court would be interfering with his possession. But the statute merely creates the status of a statutory Receiver and "subjects" him to the jurisdiction of a particular Court, only for the purpose of indicating the State Court, which *shall have jurisdiction over him when it is invoked.* The Opinion of the Circuit Court of Appeals, denying the exclusive possession and control of the Secretary of Banking for the reason that he is a statutory official and not an Equity Receiver quotes with approval from the Opinion of Judge Kirkpatrick, in the case of General Baking Company vs. William D. Gordon, Secretary of Banking, and John J. Sullivan, Deputy:—

> "As to the jurisdictional question raised, I am satisfied that this court has jurisdiction. The Secretary of Banking is an administrative officer. His office exists by statute. He is appointed by the governor and not by the court. He is not an equity receiver, and the mere fact that the statute provides that he shall have the rights, powers and duties of an equity receiver does not make him one, nor does the fact that the Common Pleas Courts of the state are given jurisdiction to make certain orders and decrees relating to the conduct of the liquidation and the rights in the funds does not mean that the fund is in the custody of the court. That depends entirely upon the nature of the office of the liquidating officer and the power from which he derives his authority."

It ill becomes the Petitioners at this time to attempt to set up their "exclusive possession" with the inference of a diligent guardian, who carefully preserving the assets entrusted to him, looks to the ultimate best welfare of his beneficiaries. The bill in the instant case was filed because of the unjustifiable delay and neglect in failing to act in accordance with the clear mandate of the statute under which the Secretary took possession of the Trust Company and because of the general right to have a substituted fiduciary appointed for the Mortgage Pool after the Secretary of Banking has determined to liquidate the Bank. As said in the Opinion in the Circuit Court, by Judge Davis—

> "The Secretary had no right to the custody of these funds when the bill in this case was filed. He determined to liquidate the assets of the Trust Company on April 3, 1933. It was his duty forthwith to give written notice to all parties interested in these funds requiring them within thirty days to apply to the proper court or official for the appointment of a substituted fiduciary to take the place of the Trust Company and if they failed or neglected to make the application within that time, it was his duty to do so. He neither notified the parties in interest nor made the application himself, but did nothing and continued to hold the funds in violation of the statute. If he had performed his duties, as directed by the statute, he would have divested himself of these funds long before the bill was filed."

III.

THE COURT OF COMMON PLEAS DID NOT HAVE EXCLUSIVE JURISDICTION OF THE MORTGAGE TRUST FUND.

A State statute cannot confer exclusive jurisdiction on the Common Pleas Court of Pennsylvania in contraven-

tion of the right of citizens of other states to avail themselves of their remedy in Federal Courts as provided by the Constitution and laws of the United States. The argument of the Petitioners to the effect that exclusive jurisdiction of the Mortgage Trust Fund is vested in the Court of Common Pleas in which the certificate of possession is filed, presents an anomalous situation. If that interpretation be correct, its effect would be to render invalid the statute in question, for this would constitute an abrogation of the right of citizens of other States to avail themselves of the remedy provided in a Federal Court. The opinions of the District Court and Circuit Court of Appeals so ably analyze the fallacy of this stand that it would be merely repetitions to state it here. Nor does Respondents' view that the Federal Court has jurisdiction over these Trust Funds as long as the Court of Common Pleas has not exercised an actual dominion over the same create any confusion. Rather, it constitutes an acceptance of the doctrine which holds that where two courts have concurrent jurisdiction that Court acquires exclusive jurisdiction which first exercises an actual dominion over the res.

O'Neil vs. Welch, 245 Fed. 261 (CCA 3rd Circuit, 1917).

In the two Lower Courts, the issue of concurrent jurisdiction was strenuously argued and in the opinion of Judge Davis, in the Circuit Court of Appeals, he clearly stated the real question as follows:—

> "The real question upon which the determination of this case depends is whether or not the filing of the certified copy of the certificate of possession in the Prothonotary's Office of Chester County conferred jurisdiction on the State Court."

Petitioners have quoted *Port Newark National Bank of*

Newark vs. Waldron 46 Fed. (2nd) 296 (CCA 3rd Circuit 1930) as a parallel case for the proposition that the "dominion" of the Comptroller of the currency was sustained against the claim of a Receiver appointed by the United States Court. It is submitted that this case is not in point and has no application to the instant case. Firstly, because the Court decided (Page 299) that at the time the Bill for the appointment of a Receiver was filed in the United States Court, the Comptroller "had full legal control of, the then future operations of the bank" by virtue of active administrative steps by the Comptroller's Examiner, and secondly because, the Court held, *that the case did not involve a conflict between two Courts of co-ordinate jurisdiction*, but "one between *the judicial and executive arm of the sovereignty*".

It is submitted that the true test is found in the able opinion in the case of *Farmer's Loan and Trust Company vs. Lake Street Elevated Railroad Company, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. ed. 667.*

> "The possession of the res vests the court which has first acquired jurisdiction, with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts, whose jurisdiction embraces the same subjects and persons.
>
> Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshall assets, administer trusts or liquidate in-

> solvent estates, and in suits of a similar nature, where in the progress of the litigation, the Court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of a special importance in its application to Federal and State Courts . . . ."

The rule as to priority of jurisdiction in cases of this kind was succinctly stated by the late Mr. Chief Justice Taft in the case of *Harkin v. Brundage, 276 U. S. 36, 42, 44, 48 S. Ct. 268, 271, 72 L. Ed. 457*:

> "The principle which should govern in a conflict of jurisdiction like this has been a number of times stated by this court. As between two courts of concurrent and co-ordinate jurisdiction, the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain it without interference and cannot be deprived of its right to do so, because it may not have obtained prior physical possession by its receiver of the property in dispute."

For some reason, Petitioners have seen fit not to press their argument that the Court of Common Pleas did acquire jurisdiction by filing of this certificate. They ask what more the State Court could do to acquire jurisdiction and whether or not it becomes necessary under the decision of the Circuit Court for the Common Pleas Court to enter a Decree in each matter involved. This evades the issue entirely, for the decisions are manifold which hold that any actual exercise of jurisdiction by a Court having concurrent jurisdiction gives such Court the exclusive right to administer the Fund. Complainants below having selected their forum, it becomes the duty of the District Court to exercise jurisdiction and retain it to the end. Petitioners submit that a State can give its courts jurisdic-

tion in any way it sees fit (Page 25 Petitioners' Brief). This may be true up to that point wherein the rights of a citizen having a concurrent remedy is infringed. *A state cannot take away the plenary power of the Federal courts, given to them by the Constitution and by Congress, by conferring exclusive jurisdiction of such controversy upon its own courts and administrative bodies, by prescribing exclusive methods of commencing or conducting litigation by prohibiting the seizure of the subject matter during its pendency or by any other means.*

Commonwealth of Pennsylvania vs. Williams, supra;

National Surety Company vs. State Bank of Humbolt 120 Fed. 593, 602 (CCA 8th Circuit, 1903);

Morrill et al vs. American Reserve Bond Company, 151 Fed. 305, 313 (CCA 8th Circuit, 1907).

IV.

THE APPOINTMENT OF RECEIVERS DID NOT VIOLATE THE ELEVENTH AMENDMENT.

The cases cited by Petitioners to support their contention that the appointment of Receivers in the District Court was in violation of the eleventh amendment are not applicable to the facts in this case. None of the cited cases deal with actions against State officials, whose powers are administrative in nature as is the Secretary of Banking in the instant case. On the contrary, where the eleventh amendment has been invoked and sustained, the facts of the case clearly indicate an attempt to interfere with the sovereign power of the State by usurping the power of an executive officer of the State, who is acting on behalf of the sovereign itself, or in attempting to acquire a property right to which the sovereign is entitled and should retain.

Where the State itself is actually the party in interest and the effect of Federal Court action would be to interfere with the executive function of the State or to deprive the State of some property interest, then the question of the eleventh amendment might well be invoked. But that is not the situation in the instant case, for *the appointment of Receivers by the United States Court does not affect in any way any property interest whatsoever of the State of Pennsylvania, and surely is not an interference with the exercise of any executive power of the State.* The Brief of the Petitioners clouds the issue by asserting that (Page 27 of Petitioners' Brief) inasmuch as the Commonwealth of Pennsylvania had undertaken to liquidate the affairs of the Trust Company, the United States Court cannot require the Commonwealth to relinquish part of that liquidation at the instance of a private citizen and that "the purpose of the Bills is to take from the State the further management of large funds". It must again be repeated that *the purpose of the Bills, and the appointment of Receivers in no way interferes with the management by the Secretary of Banking of the general assets of the Trust Company, but rather is in compliance with the State statutes* to the extent that it intends to give the beneficiary of the Mortgage Pools a fiduciary who will properly administer these funds under the supervision of the Court. The only departure is in the selection of a forum and that is a Constitutional right which cannot be taken away from the respondents. That the State of Pennsylvania has no property interest in the fund is apparent.

If the contention of the Petitioner were correct, an injunction would not lie against the Secretary as a Receiver of a closed bank for such action would be against the Commonwealth itself. Yet, the Act under which Petitioners claim the right to act as Receivers, the Act of

May 15, 1933, P. L. 565, called the Department of Banking Code, provides in Section 605:—

"Any institution of whose business or property the Secretary has taken possession as Receiver, may at any time within ten days after the Secretary has become Receiver apply to the court for an order, requiring the Secretary to show cause why he should not be enjoined from continuing as Receiver."

The Act of 1933 by Sec. 713-C permits suits against the Secretary of Banking based upon causes of action against the institution which he took over.

"Any action at law or in equity, based upon a cause of action against the institution of which the secretary is receiver, which may be brought against the secretary as receiver, shall be instituted only in the court in which the certificate of possession is filed."

Thus is presented another inconsistency in the Petitioners' Argument. The clear intent of the Legislature was to create an administrative office of the Secretary of Banking, conferring upon him certain statutory powers as a Receiver and simultaneously imposing upon him the ordinary duties and liabilities of a Statutory Receiver; creating an office absolutely independent in its aims, interest and purpose of the Commonwealth itself; an office for the purpose of rendering assistance to depositors of banks and trust companies, and unquestionably not an office exercising sovereign powers or protecting a property interest of the Commonwealth.

In *Allen v. United States 285 Fed. 678*, (CCA 1st Circuit 1923), it was held that the Commissioner of Banking of Massachusetts, who had taken possession of a bank under a State statute was not such an official over whom

the Federal Court would not have jurisdiction in a suit brought against him in an otherwise proper case of a non-resident plaintiff.

In none of the many Receivership cases heretofore argued before this Court, where the State's officer, be he Secretary of Banking, Insurance Commissioner, Labor Commissioner or the like, was the defendant to the action, has the claim of violation of the eleventh amendment been upheld. On the contrary, these officers have been considered as administrative officials; as statutory receivers without the powers or duties of Equity Receivers and not the guardian of a property interest of the State itself or an actor on behalf of the sovereign power. The recent case of *Mitchell vs. Maurer 69 Fed. (2nd) 233 (CCA 9th Circuit) 1934* is typical. The appointment of Federal Receivers of an Insurance Company was affirmed in an attempt by the Insurance Commissioner of California to vacate the same. While the question of the eleventh amendment was not involved in that case, the parties are similar to those in the instant case and apparently it was not seen sound to argue this point. It is submitted that this case is typical of innumerable similar cases heretofore argued before this Court.

In the Lower Courts, the Secretary of Banking relied strongly on the case of *Murray vs. Wilson Distilling Company 213 United States 151; L. ed. 742 (1909)* (Page 29 of Petitioners' Brief). The opinion in that case clearly distinguishes the instant case from those wherein the question of the violation of the eleventh amendment was properly introduced. In that case, the Court held as follows:

> "If we consider as an original question the provisions of the Constitution of South Carolina on the subject, and the terms of the statutes of that State, establishing the dispensary system, we think it is apparent that the purchases which were made by the

State officers or agents, of liquor for consumption in South Carolina were purchases made by the State for its account, and, therefore, that the relationship of debtor and creditor arose from such transactions between the State and the persons who sold the liquor.

We could not, therefore, sustain the exercise of jurisdiction by the Circuit Court, without effect deciding that the State can be compelled by compulsory judicial process to perform a contract obligation. It is certain that, at least, by indirection the Bills of Complaint sought to compel the State to specifically perform alleged contracts with the vendors of liquor by paying for liquor alleged to have been supplied. But it is settled that a Bill in Equity to compel the specific performance of a contract between individuals and a State cannot against the objection of the State be maintained in a court of the United States."

This case distinguishes the instant case from those where the Eleventh Amendment is properly invoked. The Circuit Court of Appeals, after due consideration, deemed this point so inconsequential that it was dismissed in the following words:—

"Appellants allege that this is a suit against the Commonwealth of Pennsylvania and is prohibited by the Eleventh Amendment to the constitution of the United States.

Under the facts in this case, this contention is unsound." (R. 146)

V.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY APPOINTING RECEIVERS.

At the time of the filing of the Bill for the appointment of Receivers, the complainants were simply exercis-

ing their constitutional rights of selecting the forum made available to citizens of another State than Pennsylvania. It is not here argued by Petitioners that the Federal Court did not have jurisdiction to act, but Petitioners apparently contend that it was an abuse of discretion to have exercised jurisdiction. It is submitted that once the District Court assumed jurisdiction over the subject matter, it became its duty to retain such jurisdiction until the final determination of the action and that under the facts of the case it would have been a violation of such duty not to have appointed the Receivers for the purpose sought.

We shall then restrict our Argument to the final issue as to whether or not the appointment of the Receivers was an abuse of discretion by the District Court. Complainants had requested the appointment of Receivers for a Mortgage Pool which had been in the custody of the Secretary of Banking from February 14, 1933—a period of over six months, during which time the Secretary had unquestionably failed to carry out his duties while in possession of the defunct Trust Company, in neglecting to take the necessary steps provided for divesting himself of the Mortgage Trust Pool. In the meantime, an unsettled real estate market required the most careful and diligent supervision of properties, particularly for the purpose of compelling the payment of interest and taxes, or where interest was in default, the operation of the real estate securing the mortgage, as a mortgagee in possession, entitled under the laws of Pennsylvania to the profits and issues of the mortgaged estate. The Act under which the Secretary of Banking took possession, carries no provision or facility for the State officer's proper management of the Mortgage Pool. The beneficiaries of the Mortgage Pool had no means of ascertaining their equities in the same, for no account had been filed by the Secretary of Banking. In the strained economic pressure prevalent in the land today, it is a little bewildering that Petitioners aver there

was "no necessity" for such appointment. Many beneficiaries of trust funds have discovered too late that conservative or careless operations by Trust Departments have permitted huge arrearages of interest and taxes, so that their interest in trust funds has diminished. Respondents submit that the question presented to the Lower Court was one of real necessity and it would have been a gross violation of duty for the District Court to refuse to act.

Further, Petitioners infer that the Receivers were appointed without the Secretary of Banking having been given an opportunity to answer the Bill. A casual inspection of the record discloses how thin this contention is.

Instead of creating a substantial issue by way of Answer to the Bill, in the initial courts, Petitioners filed various pleadings dilatory in nature and evasive in purpose as Motion to Dismiss (R. 43) and Petition to Vacate (R. 46). Further, at hearing held before Judge Welsh, in the District Court, on September 26, 1933 (R. 64), the Court specifically inquired as to whether or not the Secretary of Banking was going to file an Answer, and received an affirmative reply. But the Secretary of Banking again failed to file an Answer, when so requested. Wherein, then, is the abuse of discretion by the United States Court?

Petitioners complain that notice of the hearing on the motion for the appointment of Receivers was not given the other beneficiaries of the mortgage trust pool. Apart from the fact that the bill was in the ordinary and conventional form for the appointment of Receivers, it was still not incumbent upon the complainants to give such notice. The Banking Act of 1933 does considerably more than define the rights of the Secretary of Banking with respect to these mortgage pools; being chiefly concerned with the beneficiaries, it provides that any participant in the pool may apply for the appointment of a substituted fiduciary either before or after the Secretary of Banking has filed his account. No notice is required. No notice to all could be

given by the Complainants in the Bill, because access to the list of participants was in the hands of the Secretary of Banking. But opportunity was given the Attorney-General to notify other participants (R. 56). This was a class Bill. Moreover, the equities do not demand such procedure—for it may and should be assumed that in the proper exercise of power the Court will regard the welfare of all having common interest with the Complainant. At the arguments below, we contended that the situation is analogous to that presented when a trustee of a fund is deceased and application is made for the appointment of another in his stead. The issues have been needlessly complicated because the Petitioners feel that their high office has been offended. The fund involved is indeed like any other trust fund where the trustee is no longer able to serve, but in addition there is a statutory description of this fund which does not require the notice Petitioners contend should have been given. The complainant's procedure does not violate one iota, the letter or spirit of the statute.

Respondents merely indicate as further substantiation of the Court's action that on the morning of September 4, 1933, after the appointment of the Federal Receivers, the Court at West Chester, Pennsylvania, issued an injunction applied for on Labor Day, a Legal Holiday, restraining the Secretary of Banking and his Deputy Receiver from turning over the assets to the Federal Receivers. This action was instituted to complicate the situation—otherwise it would be absurd. That the United States Court in its sound judgment may have foreseen just such action, and for the purpose of preventing an unseemly race between courts of concurrent jurisdiction, acted promptly, is surely sound policy as well as practical administration.

However, the onus of proving abuse of discretion by the United States Court is on the Petitioners, and it is submitted that they cannot uphold this burden.

In the case of *Kingsport Press, Inc. vs. Brief English Systems, Inc. 54 Fed. (2nd) 497; (CCA, 2nd Circuit) (1931) (Certiorari denied, Owen vs. Kingsport Press 286 U. S. 545, (1932)*, the Court said:—

> "Upon the Bill of Complaint filed in the District Court, showing that the creditors could be paid in full if the business of the defendant was properly managed, it was for that Court to determine as a matter of discretion whether a Receiver ought to be appointed. *We should not interfere with the exercise of that discretion in the absence of proof of abuse*". SAGE vs. MEMPHIS, etc. R. R. COMPANY 125 U. S. 361, 8 S. Ct. 887, 31 L. Ed. 694; FOLK vs. UNITED STATES (CCA) 233 FED. 177; WARD vs. CENTRAL TRUST COMPANY OF ILLINOIS (CCA) 252 FED. 127; CITY BOND AND FINANCE, INC. vs. GRANT (CCA) 30 FED. (2nd) 671."

In the case of *First National Bank of SanFrancisco et al vs. The Detroit Trust Company et al (CCA 9th Circuit) (1918) 248 Fed. 16*, the Court refused to reverse the order, appointing Receivers unless it it appeared that the discretionary power of the Court "has been so improvidently and improperly exercised as to bring this action clearly within the meaning of the term 'abuse of power'". HEINZE vs. BUTTE AND BOSTON CONSOLIDATED MINING COMPANY; 126 FED. 1, 11, 61 (CCA) 63, 73; UNITED STATES SHIPBUILDING COMPANY vs. CONKLIN 126 FED. 132, 60 (CCA) 680; BRIGGS vs. NEAL, 120 FED. 224, 56 (CCA) 572.

The Pennsylvania law in accord: *Franklin National Bank vs. Kennerly Coal & Coke Company; 300 Pa. 479; 150 A. 902 (1930)*.

Petitioners have relied in their Brief, to a considerable extent, upon the case of *Commonwealth vs. Penn General Casualty Company 316 Pa. 1.*

That case has no reference to a situation like the instant case, where participants in a trust fund seek a substituted fiduciary for the Trust Fund after the Trust Company, as Trustee, was taken over by the Secretary of Banking.

This case is so thoroughly analyzed and discounted by Judge Davis in the case of *Commonwealth of Pennsylvania vs. Williams,* supra, that it would constitute surplusage were it repeated here. Judge Davis points out that the State Court neglected the case of *Mitchel vs. Maurer,* supra.

The final recent opinion of Brandeis, J., concerned itself only with the question of diversity of citizenship and the reversal is on that ground alone. The opinion of the Circuit Court of Appeals, however, on the issues similar to the instant case, it is submitted, is sound and in accord with the decisions of the Supreme Court, cited in the brief, on the question of concurrent jurisdiction.

VI.

CONCLUSION.

Your respondents respectfully submit that the Secretary of Banking was only the temporary custodian of the mortgage trust fund at the time of the appointment of Receivers by the District Court. That his only interest in the fund was a bare custody based upon a statutory direction to guard it until another be appointed, in *place of the insolvent Trust Company,* (and not as a substitute for the Secretary of Banking). Since he never obtained exclusive possession of the Mortgage Pool, it follows that, assuming the Secretary of Banking to be the Commonwealth's agent for the purpose of acquiring the Mortgage Pool, that the state secured no greater right than its agent. But even this falls by the wayside, for the Secretary of Banking is merely an administrative officer under the statute creating

his office. The State has no interest in the Pool; nowhere in the Banking Acts can even inferentially, be drawn the conclusion that the State had an interest in the pool. Accordingly, it is submitted that the Eleventh Amendment cannot be invoked.

Nor did the Common Pleas Court of Chester County have exclusive jurisdiction of the Pool by the detail of the Secretary of Banking filing his certificate of possession after he took possession of the Trust Company, without a Court proceeding. This was the essence of Petitioners' arguments below, but here apparently abandoned. Surely, something in actual exercise of dominion over a trust fund must be done by a Court in order to acquire jurisdiction. But the Common Pleas court did nothing, the Secretary of Banking never having invoked the Court of Common Pleas in connection with the Mortgage Pool, nor did any other certificate holder institute any proceeding in the Common Pleas Court in connection with the Pool, *until* after the appointment of Receivers by the United States District Court. Indeed, after the filing of a Certificate of Possession, the Secretary of Banking, if he changed his mind, could have the next day returned the bank to its officers, without any order of any Court, showing conclusively it was not in the control of the Court.

When Complainant filed her bill, the stage was set for a single issue: If the state court had acquired exclusive jurisdiction comity necessitated refusal by the United States Courts to act. While the precise situation has never before arisen in this district, that is, a refusal by the Secretary of Banking to surrender a Trust Fund to its rightful owners through a Federal Receiver, though the principles governing this case are well established, both the District Court and Circuit Court of Appeals, after long consideration wrote careful and sound opinions denying the acquisition of jurisdiction by the State court. Having original albeit concurrent jurisdiction with the

State court, and being the first to exercise an actual dominion over the Mortgage Pool, it became the duty of the Federal Court to proceed as it did.

There is no Federal question presented. Considering the rights of any beneficiary to request the appointment of a substituted fiduciary and the necessity in this case, the exercise of power by the Courts below was proper. True it is, that the beneficiary sought a tribunal not mentioned in the State Act, but it is a presumption that the Legislature had no intention of depriving a citizen of another state of a concurrent remedy in a Federal Court. There can be no presumption that the Legislature intended to abrogate this right, and if such intention existed, it would be of no effect.

Petitioners have contended at great length that the defunct institution being "Quasi-public"—should preclude the Federal Court, on grounds of comity, from exercising jurisdiction. If applicable at all, such argument would be in point only if the general assets of the institution were involved. No interference with such assets is contemplated. On the contrary, the public official authorized to control the general assets, can have no public interest in the mortgage pool.

It is submitted that the issue is simple and that Petitioners in justification of their own neglect have complicated and confused the questions involved. THERE ARE NO QUESTIONS OF INTERFERENCE WITH THE STATE, NOR EVEN WITH A STATE'S OFFICER. Complainants below sought the protection of a Federal Court to preserve her equity in this fund; a protection she felt the Secretary of Banking was not affording her. The lofty sentiments expressed by the Petitioners come too late to conceal the original neglect of duty toward the beneficiaries of the fund.

Finally, if the viewpoint of the Petitioners is sustained, it means that the Federal Court surrenders its

Constitutional and Congressional power for co-ordinate jurisdiction with a State Court in matters affecting the rights of a non-resident of a State where a Banking Commissioner is concerned, and that the statutes of a State are in such matters superior to the Constitution of the United States and the laws of the United States.

Respectfully submitted,

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Counsel for Respondents.

APPENDIX.

RELEVANT PROVISION OF ACT OF 1923, P. L. 809:—

"Section 40. Trust Funds.

(a) Taking Possession by Secretary. Whenever the secretary takes possession of the business and property of a corporation or person in accordance with the provisions of this act, he shall also take possession of all funds, property, and investments held by such corporation or person in any fiduciary capacity, but shall keep the same separate and apart from the assets thereof.

(b) Substituted Fiduciaries.—Upon determining to liquidate the affairs of such corporation or person, the secretary shall forthwith give written notice to all parties interested in any such funds, property, or investments held in a fiduciary capacity, so far as such notice is practicable, requiring them within thirty days to apply to the proper court or official for the appointment of substituted fiduciaries to take the place of such corporation or person. On the failure or neglect of the parties so notified to make such application within the time designated, or in case the parties in interest can not be notified, the secretary shall himself apply for such appointment of substituted fiduciaries.

(c) Settlement Without Accounting.—In any instance where there shall be no dispute as to the amount or identity of such funds, property, or investments, and all parties in interest are sui juris and so

request in writing, the secretary may, without filing of an account, transfer, pay over, and deliver to such substituted fiduciary a receipt and release in full, which shall discharge the secretary and such corporation or person from any further liability in the premises."

PERTINENT PROVISIONS OF THE ACT OF 1933, P. L. 565:—

"Section 604. Certificates of Possession; Filing—A.

The secretary, upon taking possession of the business and property of an institution as receiver, shall forthwith, under the seal of the department, prepare in duplicate a certificate, to be known as the certificate of possession, setting forth that he has become receiver of the institution. It shall state the name of the deputy receiver whom the secretary, pursuant to the provisions of this act, appoints to take charge of the affairs of the institution, and shall set forth the duties which he delegates to such deputy receiver. If the secretary does not appoint a deputy receiver prior to the date of the filing of the certificate of possession, or if he appoints a new deputy receiver or an additional one, or if he adds to the duties of the deputy receiver, he shall prepare, in duplicate, and file a supplement to the certificate of possession."

"Section 605. Injunction to Restrain Secretary. Any institution of whose business or property the secretary has taken possession as receiver, may, at any time within ten days after the secretary has become receiver, apply to the court for an order requiring the secretary to show cause why he should not be enjoined from continuing as receiver. Service may be

made in such action by serving the secretary personally, or by leaving a copy with the deputy in charge of his office in the department, or by serving the deputy receiver appointed by the secretary to manage the affairs of such institution. The court shall, after a hearing upon the merits, either dismiss the application or order the secretary to surrender to the institution possession of its business and property, but no such injunction shall issue where the secretary has been appointed receiver by action of a court of competent jurisdiction, or by action of the institution itself, in accordance with the provisions of this act."

"Section 902. Transfer of Pools and Participations without Filing on Account.—If all the corporations or persons who are the owners of all the undivided interests in any mortgage or securities pool, or in any mortgage, security, or other asset in which the institution shall have created undivided interests, are sui juris, and if they shall agree to the amount asserted by the Secretary to be due him as receiver for services rendered by the institution or by him, and for expenses incurred by either, and if they shall authorize the Secretary to transfer any such mortgage or securities pool, or any such mortgage, security, or other asset to them, or to a substituted fiduciary or to any other corporation or person agreed upon by them, and if they shall execute proper instruments releasing the Secretary and the institution from any further liability to them, the Secretary may transfer to such substituted fiduciary or to such corporation or person, without filing an account, all the mortgages, securities, or other assets comprising such mortgage or securities pool or the mortgage, security, or other asset in which undivided interests have been created. In any case where the institution, as fiduciary of an estate, is the owner on behalf of such estate of any undivided

interests in any such mortgage or securities pool, or in any such mortgage, security, or other asset, and no substituted fiduciary has been appointed for such estate, the Secretary shall not transfer such mortgage or securities pool, or such mortgage, security, or other asset in which undivided interests were created by the institution, unless he shall also be authorized to make such transfer by all corporations or persons having an interest in the estate of which the institution was fiduciary, except that where substituted fiduciaries have not been appointed for unborn beneficiaries of the estate or for other beneficiaries who are not sui juris, the Secretary shall not be required to obtain such authority from anyone in behalf of such unborn beneficiaries or other persons who are not sui juris."

"Section 903. Notice of Filing Account.—A. Upon filing an account as to any mortgages, securities, or other assets comprising any mortgage or securities pool operated by an institution of which he is in possession as receiver, or as to any mortgage, security, or other asset in which the institution shall have created undivided interests, the Secretary shall give notice thereof, in so far as it may be practicable, to all corporations or persons who are the owners of the undivided interests in any such mortgage or securities pool, or in any such mortgage, security, or other asset, and, in any case where the institution as fiduciary of an estate, is the owner on behalf of such estate of any such undivided interest, then to all corporations or persons having an interest in such estate, except that no such notice need be given to anyone on behalf of unborn beneficiaries of such estate or other beneficiaries who are not sui juris, where no substituted fiduciary has been appointed for such beneficiaries. Such notice shall be given to the corporations or persons entitled thereto under this sec-

tion, at their addresses as they appear on the books or other records of the institution, or, if the address of any such corporation or person does not appear thereon, then at the last known address of such corporation or person.

B. Such notice shall state the time and place of the audit of such account, and, except where an application for a substituted fiduciary shall have been made by any other method authorized by this act, it shall also state the intention of the Secretary to apply for a substituted fiduciary for such mortgage or securities pool, or for such mortgage, security, or other asset in which undivided interests were created by the institution, and the time and place of any hearing upon such application which may be fixed by the court."

"Section 904B. The secretary shall transfer to the substituted fiduciary appointed by the court all such mortgages, securities, other assets comprising any such mortgage or securities pool, or any such mortgage, security, or other asset in which undivided interests were created, as are in his possession as receiver, and as to which he shall have filed an account. The substituted fiduciary shall take such mortgages, securities, or other assets without liability for the nature or value of the mortgages, securities, or other assets as investments. Such transfer shall be made in accordance with the order of the court, and in directing such transfer, the court may reserve for future determination any question of surcharge against the institution or the secretary.

The court may, after petition filed pursuant to the provisions of this section, order the Secretary to make such transfer even prior to filing an account, in which case it may also reserve for future determination any question which may arise upon the audit of the account."

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IN THE

Supreme Court of the United States

No. 549. October Term, 1934.

WILLIAM D. GORDON, SECRETARY OF BANKING, AND ROBERT G. FUNKHOUSER, SPECIAL DEPUTY AS AGENT IN POSSESSION OF CHESTER COUNTY TRUST COMPANY,

Appellants,

v.

LAURA A. WASHINGTON, COMPLAINANT AND EDWARD W. WELLS AND RICHARD F. ENNIS, RECEIVERS OF TRUST FUND MORTGAGES AGGREGATING $2,901,236.07,

Appellees.

No. 550. October Term, 1934.

WILLIAM D. GORDON, SECRETARY OF BANKING, AND ROBERT G. FUNKHOUSER, SPECIAL DEPUTY AS AGENT IN POSSESSION OF CHESTER COUNTY TRUST COMPANY,

Appellants,

v.

MARY A. O'BRIEN, COMPLAINANT, AND JOHN HEMPHILL AND J. LOUIS BREITINGER, RECEIVERS OF TRUST MORTGAGES AGGREGATING $1,742,404.91,

Appellees.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENTS' BRIEF.

OPINIONS BELOW.

The Opinions of the District Court and of the Circuit Court of Appeals have not been reported. The Opinion of the District Court is printed in the Record at p. 44; the Opinion of the Circuit Court of Appeals at p. 86.

STATUTES INVOLVED.

The Federal Statute involved in this proceeding, and referred to in the courts below, is Section 24 of the Judicial Code, as amended by the Act of March 3, 1911, c. 231, 36 Stat. 1091, 28 U.S.C.A., Sec. 41 (1), and is as follows:

> "The district courts shall have original jurisdiction as follows:
>
> "First. Of all suits of a civil nature at common law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and . . . is between citizens of different states."

The Pennsylvania statutes involved in this proceeding are the Act of June 18, 1923, P. L. 809, called the "Banking Act of 1923", and the Act of May 15, 1933, P. L. 565, called "The Department of Banking Code". The relevant sections of these Acts are set forth in the Appendix of this Brief, beginning at page 74.

The other Pennsylvania statute involved is Article 2 of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, quoted on page 61 of this brief.

The Section of the Constitution of the United States involved is the Eleventh Amendment, reading as follows:

> "The judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of subjects of any foreign state."

STATEMENT OF FACTS.

On February 14, 1933, the Secretary of Banking for the Commonwealth of Pennsylvania, took possession of the insolvent Chester County Trust Company in accordance with the provisions of the Banking Act of 1923 and shortly thereafter determined to liquidate the assets of the Company.

This insolvent institution had been trustee for two mortgage pools, against which participation certificates were issued to persons residing in various States.

Under the Banking Act of 1923 as well as under the subsequent Department of Banking Code of 1933, the Secretary was empowered to liquidate the general assets of the bank for the benefit of depositors and creditors. Under the Act of 1933, he was called a Receiver.

Neither under the Act of 1923 nor the Act of 1933 was the Secretary under the statutes given the right to liquidate the Mortgage Trust Pools but on the contrary he was directed to divest himself of them.

Under the Act of 1923 the Secretary of Banking, after he determined to liquidate a bank was directed to immediately give notice to the beneficiaries of such Pools to have a substituted fiduciary appointed for such Pools, and in the event of their failure so to do, it became his duty immediately to have substituted fiduciaries appointed so that he would promptly be divested of the Mortgage Pools.

Under both the Act of 1923 and the subsequent Act of 1933 any beneficiary could go into court and ask for the appointment of a substituted fiduciary at any time after the Secretary determined to liquidate the institution, or, if the beneficiaries agreed on a substituted trustee, it was not necessary for them to go into Court but the Secretary was directed to turn the Pools over to such substitute, regardless of whether the Secretary of Banking has or has not filed an account of such Pool.

On August 25, 1933 Bills in Equity were filed in the

District Court of the United States for the Eastern District of Pennsylvania praying for the appointment of Receivers for the two mortgage trust pools; one (#549) in behalf of Laura Washington, a citizen of Connecticut; the other (#550) for Mary A. O'Brien, a citizen of New Jersey.

Pending hearing on the Bill and Answer, a motion for the appointment of temporary receivers was made, and the Court fixed August 30, 1933, for a hearing on said motion.

Copies of the Bills in Equity, together with notice of the motion for the appointment of receivers and notice of the hearing was served by the United States Marshal on the Petitioners, (defendants in the suit). However, on the day fixed for hearing, the defendants failed to appear, and at the instance of the Court the attorney representing the Banking Department was telephoned by the Clerk to appear at a later hour in the day and at such time the attorney for the Banking Department appeared and vigorously opposed the appointment of Receivers.

The Court, after argument, appointed Receivers but inadvertently omitted the word "temporary" which error was corrected by an Order filed September 22, 1933 (R. 36).

No answer was ever filed by the Department of Banking, though suggested to do so by the Court (R. 42).

The Receivers duly qualified; entered bond, and made demand for the surrender of the Mortgage Pools upon the Deputy Secretary in possession of the bank upon whom the Decree of the Court was served, but surrender of the Pools was refused.

Thereafter, on Labor Day of 1933, an injunction issued from the Common Pleas Court of Chester County (R. 58), without notice to the Federal Receivers or their counsel restraining the Secretary of Banking from turning over any of the assets of the bank to the Federal Receivers. On September 25, 1933, the Court heard argument on a Petition to vacate the Order appointing Receivers and contin-

ued the hearing to the next day to give any party in interest the opportunity to come in and be heard (R. 36). No one appeared other than the Deputy Attorney General, the Receivers and their counsel.

The Petitions to vacate were dismissed by the District Court and an Appeal to the Circuit Court was taken by Petitioners.

On January 4, 1934, argument was heard by the Circuit Court. At the time of the argument, a Petition to intervene was filed in behalf of certain holders of participation certificates. No copy of the Petition was served on Receivers or their counsel and no permission to file a Petition to intervene was given by the Circuit Court of Appeals, nor did it ever form a part of the record in this case by Order of the Circuit Court of Appeals or any other Court, although it is made a part of the record filed by the petitioners.

The basis of the Petition (R. 68) was substantially that they preferred Receivers to be appointed for the Pools by the Chester County Court rather than the Federal Court.

The Circuit Court of Appeals sustained the appointment of the Receivers.

CORRECTED STATEMENT OF QUESTIONS INVOLVED.

1. Where, under a state statute, a substituted fiduciary of a mortgage pool to take the place of a closed banking institution must be appointed, after the Secretary of Banking, has determined to liquidate the Bank, can a beneficiary of the pool, who is a non-resident of the state, proceed for such appointment in the Federal Court?

2. Assuming a beneficiary has that right, can a state statute limit him to proceeding only in the State Court?

3. Assuming a state statute cannot deprive him of the right to proceed in a Federal Court, did the Federal Court

abuse its discretion in appointing Receivers, there being no provision in the statute for liquidation of a mortgage pool, and the Secretary of Banking being specifically enjoined from liquidating the mortgage pool, but directed to divest himself of it?

ARGUMENT.

SUMMARY OF THE ARGUMENT.

The Pennsylvania banking acts, the Act of June 15, 1923, P. L. 809 and the Act of May 15, 1933, P. L. 565 permit the Secretary of Banking to take possession of insolvent institutions. Thereafter a certificate of possession is filed in Harrisburg. A duplicate of such certificate is also filed in the office of the Prothonotary of the County where the institution is located as well as in every county where real estate is situate, the title to which is in the insolvent institution. These certificates are indexed in the Judgment Index Books.

In the instant case, the Act of 1923 was in effect when the Secretary of Banking took possession of the Chester County Trust Co. In July of 1933, the new Banking Code of 1933 became effective.

Under both acts, however, the Secretary of Banking is given the complete authority of a statutory receiver empowered to liquidate the general assets of a banking institution. *This authority is not extended to Mortgage Trust Pools,* such as is involved in this argument. The acts provide that the assets of a mortgage trust pool are to be kept apart from the general assets of the bank. The liquidating process which the Secretary applies to the general assets are not to be introduced to the assets of the mortgage trust pool. True it is that such segregated assets are in the custody of the Secretary once he has taken possession of an insolvent bank, but since the banking officials have been ousted, and mortgage trust pools exist under the roofs of such institutions, it follows naturally that the Sec-

retary must be charged with their safekeeping pending their final administration. Now, if it was the intention of the Legislature of Pennsylvania, as appellants contend, to give the Secretary of Banking control and jurisdiction over such assets, it would have been a simple matter to have stated so. But it did not. On the contrary, the Act specifies the manner in which the Secretary of Banking is to *divest* himself of this fund. And here there is no ambiguity. If, under the clear statement of the acts, after the Secretary of Banking has taken possession of an institution which operated a mortgage trust pool, all the participants in the pool came to the Secretary and asked him to turn the assets over to one of them, he would have no alternative but to do so. The Act further authorizes the holder of a participation certificate to apply for the appointment of a substituted fiduciary *at any time*, to take the place of the defunct corporation. (It is important to notice that the substituted fiduciary takes the place of the corporation and not the Secretary). Briefly, the Secretary is not to liquidate the mortgage trust pool under the statute nor could he possibly be selected as a substituted fiduciary to do so.

Perhaps this argument would never have arisen if the Commonwealth of Pennsylvania had passed two separate acts instead of a single act with separate divisions; one governing the administrations of the general assets of the bank, the other, mortgage trust pools. These acts are detailed at great length in this Brief to show the evident and specific manner in which the Legislature expressed its intention. The argument should be submitted in all fairness, as if the only statutes involved were those sections of the Act of 1923 entitled "Trust Funds" and "Mortgage Trust Pools" under the Act of 1933. The appointment of Federal receivers, it is conceded by appellants, in no way interferes with the Secretary of Banking as liquidator of the Banking business. It is submitted that such re-

ceivers cannot possibly be construed as interfering with the Secretary of Banking as custodian of the mortgage trust pool, for the order of the Federal Court merely carries out the dictates of the state statutes. Appellants, however, argue that under the state statutes relief as sought in the instant case, must be requested in the state court. We submit that the rights of a non-resident to equitable relief in a Federal Court cannot be abrogated by a state statute.

The final test of this argument may be found if this court should reverse the decisions below. The assets comprising the mortgage trust pool would not be relinquished to the Secretary of Banking for purposes of liquidation, but to the substituted fiduciary or receivers appointed by the Chester County Common Pleas Court, who would be appointed upon the prayer of the Bill filed after the bill was filed in the Federal Court. The Supreme Court would thus place a stamp of approval upon an obvious race for jurisdiction. As Judge Welsh said in the Opinion in the District Court (R. 46):

> "It is somewhat difficult to understand the position of the Banking Department of the State of Pennsylvania in this case. What interest and standing has that department? Their position is one of bare, temporary custody, with the duty and responsibility thrown upon them to divest themselves of even that status at the earliest possible moment."

The state statutes further provide that the only forum available for participants in mortgage trust pools shall be the state court wherein the Secretary of Banking shall have filed his duplicate certificate of possession. Unquestionably the Commonwealth may limit the permissive forum within its own boundaries and for its own citizens as it sees fit, but it does not follow that the act intended (even if it could have such effect) to deprive citizens of other

states of existing remedies in Federal courts. For the purpose of this summary argument, it is merely stated that the Pennsylvania legislation did not contemplate such restriction and if it did it would be ineffective.

Nor is the Common Pleas Court of the State of Pennsylvania exercising jurisdiction over this Pool and for the following reasons: The only connection that the State Court has with the Mortgage Trust Pool is by mere co-incidence from the fact that the Mortgage Trust Pool is in the vault of the Chester County Trust Company, the assets of which presumably are presently being administered by the Secretary of Banking. The Secretary of Banking contends that the filing of a duplicate certificate to the effect that he has taken charge of the assets of the closed bank is sufficient to confer jurisdiction upon the Common Pleas Court, but this as is pointed out by Judge Davis in his opinion in the Circuit Court is an administrative detail analogous to recording a judgment in the Index books of the Prothonotary's office. The statutes clearly show that if all the beneficiaries would agree upon the choice of a substituted fiduciary that the Secretary would be authorized to turn over the assets of the Mortgage Trust Pool to such an appointee without the consent of any State Court. How can this be reconciled with the contention that the State Court first acquired jurisdiction of the Mortgage Trust Pool?

Since the State of Pennsylvania has no proprietary interest in this fund and since the Court of Common Pleas could not have jurisdiction either through the filing of the certificate of possession or from the statutory interpretation as we have just given it, it follows that if the Federal Court had jurisdiction, that it first exercised such jurisdiction. The tremendous weight of authority is to the effect that where two Courts have concurrent jurisdiction, the Court which first exercises its jurisdction, retains it exclusively. The first actual exercise of jurisdiction was by the

Federal Court. It may further be said that there is substantial authority that where the subject matter of litigation is different in the two courts, that the Court which first obtains actual possession of the res has exclusive jurisdiction. The State official in the meanwhile has retained possession of the fund awaiting the decision of the Court.

The Commonwealth of Pennsylvania like any other sovereignty has appointed many agents to properly execute the incidents of a sound government. One such agent is the Secretary of Banking. The source of his appointment is found in Article 2 of the Administrative Code of 1929. The act provides for the various executive and administrative functions of government. Under this code the office of Secretary of Banking is created as an administrative officer. The action in the instant case naming the Secretary of Banking and his deputies in possession of the Chester County Trust Company as defendants was not in violation of the 11th amendment but strictly in conformity therewith. This was not a suit in equity against the State of Pennsylvania. The Commonwealth is not the real party behind the action; nor does it possess any proprietary interest in the fund. The Federal receivers taking possession from the Secretary of Banking in no way violates any State interest. The secretary is named party defendant, as temporary custodian of a fund he must give up at the earliest moment. Nor is this statutory receiver an executive officer of the government, so that the suit may not be said to be one which interferes with the mechanism of government. Such transient possession as is vested in the secretary under the banking acts in no way can be said to create any bar to action as is contemplated by the constitution. The state is not being asked to perform an act or relinquish a right. The appointed receivers are to take the place of the defunct corporation and not the secretary of banking. This fund must be given up by the Secretary of Banking and the sole question is: must complainant seek

that relief in the Common Pleas Court of Chester County because the State act so provides for its own citizens?

For the obvious reason that the Secretary of Banking in possession of the defunct bank was custodian of the mortgage trust pool, he became a necessary party defendant to the action in the district court. Where a state official, defendant to an action, stands in the place of his government, then it may be true that as such a substituted person he does not have citizenship for the purpose of the diversity clause.

Appellants have cited a number of cases for the proposition that the Federal courts were without jurisdiction inasmuch as the statutory official is not a citizen within the meaning of Section 24 of the Judicial Code. None of the cited cases (and they are indeed few in number) are applicable to the instant case, for all were decided on the grounds that the actual party in interest was a state or the United States.

Under these circumstances should not the Federal Court have exercised jurisdiction? What was the precise picture presented to the Federal Court and what the necessity for appointing receivers? A State official liquidating a defunct bank was in custody of a Mortgage Trust Pool which was wrongfully in his possession at the time of the filing of the bill for he had violated the statute in failing to divest himself of this fund as he was directed to do. No state court was exercising jurisdiction over the mortgage trust pool. An unsettled real estate market required the most careful and diligent supervision of properties; particularly for the purpose of compelling the payment of interest and taxes, or where interest was in default, the operation of the real estate securing the mortgages as a mortgagee in possession, entitled under the laws of Pennsylvania to the profits and issues of the mortgaged estate. Participants in pool were worried over their investments which in many cases represented a lifetime saving. No account-

ing of their investments were forthcoming. This substantially was averred in the bill.

Judge Welsh in appointing receivers said (R. 49):

> "This Court having affirmed the jurisdiction of the Federal Court in the instant case a word as to the motives which move it as a Chancellor to act would seem to be in order. It must be remembered that the Banking Department took charge of the defunct institution on February 14, 1933. Notwithstanding the fact that millions of dollars are concerned, and a large number of certificate holders are involved nothing has been done by the Banking Department to provide the means for an active, intelligent, responsible administration of its pools. Just why such a situation has continued to exist has not been explained. Non-resident petitioners in this case are dissatisfied with such inaction. In the exercise of their constitutional rights they have appealed to the equity side of this court for relief. They are alarmed over the safety of their holdings. No excuse, no explanation, and no promises of a future policy have been given . . . This Court, therefore, feels that it not only has jurisdiction, but that in view of the status of the case its duty as a Chancellor is that that jurisdiction be recognized and that the prayed for relief be granted."

We submit this to be a fair, logical and equitable conclusion. Refusal to appoint receivers after such an inevitable finding would have been an abuse of discretion.

A. THE FEDERAL COURT HAD JURISDICTION TO APPOINT RECEIVERS AND ITS ACTION WAS A PROPER EXERCISE OF THIS POWER.

I. The Secretary of Banking, Under the Pennsylvania Statutes, Has But a Temporary Custody of a Mortgage Trust Pool, and Cannot Liquidate Such Assets.

The Banking Acts of Pennsylvania segregate mortgage trust pools from the general assets of a bank. As to the general assets, a complete system of liquidation through the Secretary of Banking is provided for. Such supervision is not extended to a fund, such as is here involved.

It has been urged that the appointment of Federal Receivers is an interference with the Secretary of Banking in his liquidation of the insolvent Chester County Trust Co. This contention is untenable because the Federal Receivers are only authorized to take over the Mortgage Trust Pool, and as to this pool, the Secretary of Banking is not acting as a statutory liquidator, nor under the statutes could he possibly be. Under these acts, the Secretary of Banking, can, at the most receive a naked temporary custody of the mortgage trust pool.

The Act of Pennsylvania of June 15, 1923, P. L. 809, known as the Banking Act of 1923 was in force when the Secretary of Banking took possession of the Chester County Trust Co. on February 14, 1923. This act provides in Section 40 (quoted in full at p. 74 appendix) specifically for mortgage pools, as contrasted with the general assets of the bank. Substantially, it is provided that:

(1) Trust Funds (mortgage pools) form no part of the general assets of a bank and are to be kept separate and apart from the other assets of the bank, by the Secretary of Banking, who is given temporary custody.

(2) The Secretary of Banking is not to administer the fund, but as soon as he has determined to liquidate the

assets of the bank he is required, *forthwith* to give notice to all the beneficiaries, for them to apply within 30 days for the appointment of a substituted Fiduciary to take the place of *such corporation,* (the insolvent bank). It is noteworthy that the statute does not say that the substituted fiduciary is to take the place of the Secretary of Banking, but rather in place of the corporation. What other interest in the Secretary could this signify, but a mere custody?

(3) Upon the failure of any beneficiary to apply for a substituted fiduciary within 30 days after receipt of such notice from the Secretary of Banking, then the Secretary shall himself apply for the appointment of a substituted fiduciary. So that in no event is the Secretary to administer and liquidate this fund.

(4) Finally, if all beneficiaries consent, the assets may be turned over to a substituted fiduciary selected by them without any accounting or court action.

It is clear, therefore, that under this statute, the Secretary of Banking had no right to liquidate this fund, as other assets of the Bank, but had to divest himself of it.

It is further evident that until such an appointment is made, or *at least until application for such appointment is made,* that this fund is not within the jurisdiction of any court for the specific reason that until such an appointment or application is made there is not the slightest vestige of control exhibited by any state court.

Notwithstanding the specific provisions and directions of the Act of 1923, the Secretary of Banking failed in his duty, and up to the time of the filing of the Bill, six months later,—no action was taken—nor notice issued by him, nor has he done anything up to the present to divest himself of the pool.

On July 3, 1933, a new Banking Code became effective. Under this Act a further separation of the assets of the mortgage pool from the general assets of the Bank was spe-

cifically provided for. The earlier act captioned mortgage pools under the general heading and treatment of "Trust Funds". But the Pennsylvania Act of May 15, 1933, P. L. 565 leaves room for no doubt by heading the subject "Mortgage or Security Pools". The pertinent sections 901, 902, 903 and 904 A are quoted in full in the appendix to this brief at p. 77.

Substantially the Acts are alike so far as they pertain to the question in the instant case. If anything, the Secretary's passive custody of the fund and the State Court's indifference to the mortgage trust pool as distinguished from the general assets of the Bank or Trust Company is emphasized. Section 902 permits the beneficiaries when they unanimously agree upon the substituted fiduciary to direct the Secretary of Banking to turn over to such person the assets constituting the mortgage pool. (This extends Section 40 of the Act of 1923). *The consent of the state court is not necessary.* Is it conceivable that if the Secretary of Banking was to liquidate this fund exclusively in the same manner as the other assets of the bank that the statute would provide a method by which beneficiaries could interfere with such liquidation? No such provision is made for any of the other assets of the bank. The logical conclusion, therefore, must follow: that the Secretary's possession is a mere temporary custody. And is it conceivable that if the State Court was exercising jurisdiction over the fund, that the statute would provide a means of wresting the res away from the court without at least having the State court consent or abandon its jurisdiction? The logical conclusion again follows: the State court was not exercising jurisdiction over the mortgage trust pool.

Section 904 provides, inter alia:

1. That after the Secretary of Banking shall have filed a supplemental certificate setting forth his intention to liquidate the institution, and either before or after he

has filed his account, any beneficiary may apply for the appointment of a substituted fiduciary.

2. If no such petition be filed within thirty days after the beneficiaries receive notice of the Secretary's intention to file an account, then the Secretary is directed to apply for such appointment in the court in which he has filed his certificate of possession.

Until the complainant filed her bill in the District Court for the appointment of Receivers, no application had been made in the state court for the appointment of a substituted fiduciary, either by a beneficiary in the exercise of his equitable right as well as that granted him under the State statute, nor by the Secretary of Banking in accordance with its mandates. The only justification offered by the Secretary for his failure to act is that Section 901 provides for the filing of an account "at his convenience". It is submitted that the long delay of the secretary cannot be justified by this clause which at the most should mean a reasonable time. Further, this completely overlooks the fact that the Banking Act of 1923 was in force when the Secretary of Banking took possession, which directed him to give notice "forthwith" to beneficiaries to request a substituted fiduciary for the institution.

It is respectfully submitted that the powers of the Secretary of Banking under the State statutes, with regard to mortgage trust pools, is a limited authority indeed. That he was not in the process of liquidating these assets in a manner attributable to conventional receiverships; nor could he so act. That the act confers upon this official a mere temporary custody of the fund due to his possession of the general assets of the Bank which he is properly liquidating. If this be so, then the appointment of Federal receivers, in no way conflicts or interferes with the Secretary of Banking in the performance of his duty to liquidate the general assets of the bank.

The practicalities support this contention. Immedi-

ately after complainant filed her Bill, application was made in the local court for the appointment of a substituted fiduciary. (Although this forms no part of the record here.) The Banking Department must concede that if the appointment of Federal Receivers is not upheld, that the Mortgage Pool must be surrendered to a fiduciary or Receiver of the County Court. Accordingly, if an unfortunate atmosphere of "race for jurisdiction" has been cast over this case, it cannot, therefore, be attributed to complainant.

The complainant then, is in no way attempting to interfere with the Secretary of Banking in the exercise of his duty as statutory receiver, liquidating the assets of the Chester County Trust Company. Interference if any, is with the Secretary as passive custodian of the mortgage trust pool, *the assets of which have been earmarked for supervision by the beneficiaries.* It follows that many of the cited cases as BANK OF BAY BISCAYNE VS. HANKINS, 42 Fed. (2nd) 209 (C. C. A., 5th Circuit) has no application to the facts in the instant case. In the cited case, Comptroller of the State had closed the bank and was liquidating its assets in accordance with the state statute, when the receiver was appointed by the Federal Court at the instance of a depositor. The receivership proceedings concerned the general assets of the bank and not a special fund for which a statute provided a separate system of liquidating. The Court said:

> "Whenever the laws of a state provide for supervision and control of the affairs of a bank by an authorized official, and also for the *ultimate liquidation* and distribution of its assets under his direction, in the event of its insolvency, it is a matter of grave consequence for any court to interfere, and that should be done only in a perfectly clear case."

Our stand in the instant case in no way conflicts with this

theory. *Pennsylvania has not provided for the liquidation of the mortgage trust pool through an authorized official.* On the contrary, liquidation cannot take place through the official supervising general banking assets for he is directed to divest himself of this fund and permit liquidation through the beneficiaries. Similarly, and for the reason that the Secretary is not the statutory official selected by the State to liquidate the assets of the mortgage trust pool, the following cases have no application:

AMOS v. TRUST CO. OF FLORIDA, 54 F (2nd) 286 (1931) C. C. A. Fifth Circuit.

In this case, pending the hearing in the Federal Court for the appointment of receivers for the trust company, the Comptroller of Florida took possession of the institution as he was authorized to do under the state statute and then intervened in the Federal proceedings. The ousting of the state comptroller was denied on the primary ground that the statute under which he acts gave him powers to administer and liquidate the fund, and that since a state statute had provided a method of liquidation by its own officials, such administration should not be interfered with. The court said:

> "The comptroller and his liquidators are competent to execute trusts like those here involved; they being within the powers of the corporation to be liquidated . . . A proper respect and deference on the part of the federal agencies of government towards those of the state, compels that assumption."

If a Federal receiver was sought for the general assets of the Chester County Trust Co. then the AMOS v. TRUST CO. decision, *supra*, might apply, for under the Banking Act of 1933 the Secretary was liquidating such assets and has competent facilities to continue to do so. *But the case can have no application to the one at bar, for the specific reason that the Secretary is merely the custo-*

dian of the mortgage trust pool and not the fiduciary to liquidate it, nor could he be.

MITCHELL v. LAY, 48 F (2d) 79 (C. C. A. 9th Circuit) 1930 (appellant's brief, p. 19 and p. 26).

In this case applicant in the Federal Court for the appointment of receivers for an insurance company was the holder of an award under the Workmen's Compensation Law of California. The license of the insurance company had been revoked by the Insurance Commissioner, who, acting under the state statute had applied to the Superior Court about a month after federal proceedings were instituted to liquidate the affairs of the association and praying the court to appoint him receiver. The action of the district court appointing receivers was reversed on the ground that the Industrial Accident Commission had set aside the award made plaintiff so that the plaintiff was "merely the holder of an unliquidated claim being prosecuted in state tribunal".

The court said:

> "Whether, upon the ground of diversity of citizenship and in default of any judicial proceeding in the state courts, a federal court of equity might enforce the rights of a non-resident to such a fund or take jurisdiction thereof, is a question not involved in this case."

The decision in the cited case is utterly irrelevant to this argument.

JACOBY VS. BOND AND MORTGAGE GUARANTY COMPANY, 72 F (2nd) 420 (CCA 2nd Circuit) 1934 and (Appellant's Brief, p. 25). Here the Superintendent of Insurance by order of the court had been in possession of a defunct trust company since August 3, 1933, and under a New York

statute was liquidating the assets of the company. In December 1933, complainants filed a bill for the appointment of trustees for the corporation and prayed that the act under which the Superintendent of Insurance had taken possession be declared unconstitutional. The Circuit Court held the act constitutional, but decided the case on prior acquisition of jurisdiction by the State court. On page 424 the Court said:

> "In either event the superintendent has taken over a business under an order of the state court and is exercising functions which he is authorized to exercise in such cases by the New York law. This fact, irrespective of the wisdom, or even the validity of his acts, makes it necessary for dissentient certificate holders to seek relief in the state court which had assumed prior jurisdiction."

It might well be indicated that the state court assumed prior jurisdiction in this case by issuing a rule to show cause why the company should not be taken over by the Insurance Commissioner.

So that the Jacoby case merely illustrates the well established principle that exclusive jurisdiction is vested in the court having a concurrent jurisdiction and first exercising its power.

Two recent decisions of the Supreme Court of the United States, by Stone, J., clearly show the distinction between the case at bar and the cases of AMOS v. TRUST Co. and MITCHEL v. LAY, *supra*.

In COMMONWEALTH OF PENNSYLVANIA, PETITIONER, v. JOHN G. WILLIAMS, ET AL, No. 394—October Term, 1934, the Federal court had appointed receivers for a Pennsylvania building and loan association upon the application of a non-resident, on February 3, 1933. On hearing, the Secretary of Banking had informally requested the district judge not

to make the appointment of receivers permanent and to allow the property of the defendant to be surrendered to the Secretary, to be liquidated and administered in accordance with the state statutes. On February 17, 1933, the Secretary "took possession" of the property and appointed special deputies to assist in liquidating the defendant's business. The opinion of the Supreme Court, by Stone, J., held that while the Federal court has jurisdiction to appoint receivers, it should not have exercised this power because the Secretary had been clothed with a complete authority and system of liquidation under the State act. The court said:

> "Here no state court is asserting jurisdiction, but *the state officer, charged by the statutes of the state with the duty of supervising his own building and loan associations and of liquidating them by an adequate procedure* when insolvent, *asks to proceed with the liquidation.* See AMOS v. TRUST CO. OF FLORIDA, 54 F (2nd) 286, 288 (C. C. A. 5th) (Italics ours) . . .
>
> Here, upon presentation of the application for appointment of receivers, which would involve such an interference, the district judge might appropriately have required notice of the application to be given to the state officers. It was his duty to do so, if satisfied that the delay involved in adopting that course would not result in the sacrifice of any vital interest of the insolvent corporation, its creditors or its stockholders. On the showing *that their interests would be adequately protected by liquidation under the direction of the Secretary of Banking; the district judge should have denied the application* for the *appointment of receivers,* or, if he had already appointed them, should have discharged the receivers, and directed the surrender of the property in their possession to the Secretary *in order that the liquidation might proceed under the state statutes.*" (Italics ours.)

In GORDON v. OMINSKY, No. 395—October Term, 1934, argued at the same time as COMMONWEALTH v. WILLIAMS, supra, the opinion of the court also by Stone, J., upon a similar set of facts concludes for the reasons as above that the Federal court should not have exercised jurisdiction.

The opinion concludes as follows:

> "In any event, *the allegations of the answer, that 'the possession and control of the assets of the defendant by the Secretary of Banking, pursuant to statute, will result in the preservation of the assets of the defendant and the proper distribution of funds realized from their liquidation, are not challenged.*" (Italics ours.)

No answer was filed by the Secretary of Banking to the allegations in complainant's bill. It is a certainty that such an answer could not set forth that the Department of Banking is clothed with complete authority under the statute to liquidate the assets of the mortgage trust pool. On the contrary, it would necessarily set forth the Secretary's direction to divest himself of this fund to a substitute selected by the beneficiaries or the Court. It is submitted that had such an answer been filed, it would be apparent that neither the State of Pennsylvania nor any of its agents had any interest in this fund so that many of the questions here framed, would be more readily disposed of.

The interested parties in setting in motion the liquidation of mortgage trust pools are, the beneficiaries of the fund. The Attorney General in his annotations to the Act of 1933 had this to say:

> "The owner of an undecided interest in any mortgage or securities pool or in a special mortgage securities pool probably has the right to ask for a substituted fiduciary at any time."

The Department of Banking has no position in liquidation of a mortgage pool, and if no beneficiary seeks the appointment of a fiduciary for that purpose then the Secretary is ordered to file an application for such a fiduciary.

Appellants have contended that the Federal court should not exercise jurisdiction where a state by statute has provided a complete system for the liquidation of insolvent institutions through a statutory official. This principle has no application to the instant case for the statutes of Pennsylvania have not provided such a system, nor clearly was such a system contemplated for mortgage trust pools. This is shown by the manner of setting up an independent method of liquidating such pools as distinguished from general banking assets. Our analysis of appellant's cases we submit, show them, for these reasons, to be inapplicable.

II. The Mortgage Trust Pool Was Not Within the Jurisdiction of the County Court When Federal Receivers Were Appointed.

The Department of Banking Code of 1933, provides in Section 604 (Quoted in full on page 76 appendix) that after the Secretary of Banking takes possession of an insolvent institution, he shall prepare in duplicate a certificate, the original of which shall be filed in his office in Harrisburg and the copy in the prothonotary's office. The Act of 1923 by Section 22, quoted in full at p. 74 in the appendix to this brief, was substantially the same. Then, certified copies shall be filed with the recorder of deeds in every county where the institution possessed real estate.

If at the time such certificate is filed, the Secretary of Banking has not named a deputy to act for him, a supplemental certificate to that effect is to be filed in exactly the same manner as the original certificate, when the deputy finally is named.

The Act further defines the status of the Secretary of Banking after he has complied with the above provisions.

Section 701. Status of Secretary as Receiver.—

"Except as otherwise provided in this act, the Secretary when he has taken possession of the business and property of an institution, shall be responsible to the court in which the certificate of possession is filed, and not to any other court. His rights, powers, and duties shall be those of a general receiver appointed by a court in equity in this Commonwealth, except as such rights, powers and duties are increased or limited by this act."

Upon the application of a depositor or creditor of a banking institution for the appointment of a receiver, only the Secretary can be appointed.

Section 606. "Power of Courts to Appoint Receivers. No court shall appoint anyone but the Secretary as receiver of an institution. Whenever any court, at the instance of a depositor, shareholder, or other person entitled by law to institute such proceedings, shall determine that a receiver should be appointed, for any reason whatsoever, it shall appoint the Secretary as such receiver.

When thus appointed receiver by a court, the Secretary shall serve in the same manner and with the same limitations and he shall have the same rights, powers, and duties, as when he becomes receiver by operation of law and without appointment by any court. *No court shall impose upon the Secretary as receiver any duties or restrictions which are in conflict with the provisons of this act.*"

We are at this point concerned with the legal standing of the Secretary as a "Receiver" and since the sections

of the act governing Mortgage Trust Pools naturally contain nothing about the Secretary as a "Receiver", for that is not contemplated, reference must be made to those sections which do define his power as a Receiver but limit his liquidation to general banking assets only.

The appellant contends that when the Secretary files his duplicate certificate of possession with the prothonotary, the State Court immediately acquires jurisdiction and moreover, that the statute subjects him to the jurisdiction of a particular state court.

In the opinion of the Circuit Court of Appeals (R. 89) Davis, J., denied this contention in the following manner:

"It" (the statute) "subjects" him to the jurisdiction of a particular court, only in the sense that it points out the State court which shall have jurisdiction over him when it is invoked.

Judge Kirkpatrick in commenting on this section of the statute in the case of GENERAL BANKING COMPANY VS. WILLIAM G. GORDON AND JOHN J. SULLIVAN (decided October 11, 1932) said:

> "'As to the jurisdictional question raised, I am satisfied that this court has jurisdiction. The Secretary of Banking is an administrative officer. His office exists by statute. He is appointed by the governor and not by the court. He is not an equity receiver, and the mere fact that the statute provides that he shall have the rights, powers and duties of an equity receiver does not make him one, nor does the fact that the Common Pleas Courts of the state are given jurisdiction to make certain orders and decrees relating to the conduct of the liquidation and the rights in the funds does not mean that the fund is in the custody of the court. That depends entirely upon the nature of

the liquidating officer and the power from which he derives his authority.' ".

As to the effect of filing the certificate of possession, the Circuit Court had this to say (R. 90):

"The indexing of a certified copy of the certificate of possession, when filed in the office of the prothonotary by the Secretary, as plaintiff, in the 'judgment index' does not confer upon the court jurisdiction which has not been invoked. The mere filing of a paper which in fact is nothing more than a notice that possession of the property has been taken, cannot confer jurisdiction upon the court in the absence of any law to the effect that such an act constitutes the beginning of legal action rather than the notice of a mere act of a state officer in the performance of his administrative duties. The Secretary, just as any other citizen, may invoke the jurisdiction of the court, but the simple filing of a mere notice of an administrative act does not do so and this seems evident from the terms of the Act. This paper is more particularly a notice to the county in which the corporation is located as distinguished from a notice to the Commonwealth generally when filed in Harrisburg. As Judge Kirkpatrick observed with regard to an "equity receiver" the fact that he is called "plaintiff" in this simple notice does not make him one in a legal action which the paper itself does not in terms, nor by necessary or reasonable implication, purport to institute. It is not analogous to the filing of a bill for a receiver, as stated by counsel, which contains definite allegations invoking the court's jurisdiction and praying for certain definite action of the court. The certificate does nothing of the kind. It is only a notice setting forth that the Secretary has taken possession of the business and property of the corporation, does not in-

voke the jurisdiction of the court and asks nothing of it. It is rather analogous to the recording of a deed, mortgage or notice of lien."

Judge Davis' theory that filing of the certificate of possession is no more than public notice is amply borne out by the indifference with which the statute treats this procedure. This is covered by Section 604 already referred to (quoted in full on p. 76 of the appendix). Firstly, the original certificate of possession is not filed in court—that is reserved for the main office in Harrisburg. Only a duplicate is filed. Then, so as to notify all owners or otherwise interested parties, a similar certificate is filed in every county where real estate is located in which the institution is interested. Lastly, at the time the Secretary names a deputy, if he has not already done so, he files supplemental certificates identical with the first filed. We submit that this is not the institution of judicial proceedings.

The case of FARREL V. STODDARD, SUPERINTENDENT OF INSURANCE OF NEW YORK, ET AL 1 Fed. (2nd) 802 (C. C. A. 2nd Circuit) 1924, presented a situation almost identical with the instant case. There a non-resident of New York sought to impress a trust upon certain assets of an institution which had been taken over by the Superintendent of Insurance of the State of New York in accordance with this statute. The Insurance Commissioner had applied to the Supreme Court of the State of New York, as he was required by the statute to do, on February 6, 1923, for an order permitting him to act under the statute and take possession of the property and conduct the business of the Niagara Company. About February 15, 1923, the State court made such an order. On February 27, 1923, the plaintiff filed his bill in equity. The superintendent of insurance filed a motion asking the Federal Court to decline ju-

risdiction on the grounds of comity. The plaintiff contended that the fund was not in the custody of the State court or its agent, but rather in the custody of the defendant as a public officer. The motion to decline jurisdiction was denied. The court said:

> "An examination of Section 63 of the Insurance Law of the state of New York makes it clear that the superintendent of insurance is a public officer in the executive department of the state government, and that he still retains his character as a public officer when he acts as liquidator of insurance companies under the provisions of this statute. His power to act as custodian of the res comes alone from the statute. The judicial power cannot change or modify this statute, or affect his power in any respect whatever. True, the defendant must first apply to the court for an order to act as liquidator. That, however, merely means that the court must give the signal to start the machinery under which the superintendent, the agent of the executive power, acts. Thereafter, the defendant, as the representative of the executive power, pays no heed to the court or its mandates. His chart is the statute under which he acts."

Notwithstanding the order of the State Court in the quoted case, the Federal Court decided that it should retain jurisdiction. The case at bar does not even present that problem for in no conceivable manner can any *judicial action* be found. The only analogy is the filing of the certificate of possession which is not in the nature of an application to a court.

It is respectfully suggested that a fair and logical test to determine whether or not a court has exercised jurisdiction when the question centers about the actual dominion

of the Court is found in the case of WARD v. FOULKROD, 264 Fed. 627 (C. C. A., 3rd Circuit) 1920, Judge Woolley said:

> "Control over the property in controversy, it is conceded, is the test of jurisdiction in a conflict between courts of concurrent jurisdiction. When the question which court has control over the property—is determined, it is equally well settled that the court which first acquired such control is the one that first acquired jurisdiction and has the right thereafter to proceed with the action to its final determination without interference with the other court. TAYLOR v. TAINTER, 16 Wall 370, 21 L. ed. 287; BELL v. TRUST COMPANY, 1 Biss. 260 Fed. Cas. 1260. . . ."
>
> "Where two courts may each take jurisdiction of a matter, that court in which the first action was brought, *if the action be of a character that makes the court's dominion over the res essential to its judgment*, or if the action be substantially the same as the one later brought in the other court, will acquire jurisdiction of the res on the commencement of the action and retain it to the end although actual seizure thereof was made by the other court in the later action . . ."

Completely apart from the problem of *priority* in acquisition of jurisdiction Judge Woolley uses as a test for exercise of jurisdiction, the element of control. By this, the court clearly explains, is meant some actual act of dominion. In all fairness, it becomes difficult to perceive how any actual act of dominion can be attributed to the local court from the administrative detail of filing a certificate of possession.

In ALLEN v. UNITED STATES, 285 F 678 (C. C. A. 1st Circuit), 1923, it was contended that the Banking Commissioner of Massachusetts acting under a statute almost iden-

tical to that in the instant case, when he had taken possession of an insolvent institution became a receiver of the state court and his possession became the possession of the state court. In denying that the state court had jurisdiction of the res, the court said:

> "The character of the commissioner has recently received consideration by the Supreme Judicial Court of Massachusetts in COMMONWEALTH v. ALLEN, 133 N. E. 625 in which the court, by Rugg, C. J., said:
>
> 'The commissioner is an executive or administrative officer. He exercises visitorial powers, is charged with duties of rigid inspection, and when circumstances exist enumerated in St. 1910, C. 399 Sec. 2 (G. L. c. 167 Sec. 22) may take and retain possession of the property and business of the bank for the purpose of liquidation of its affairs in accordance with the statute. He acts in all these particulars as a public officer, and not as a receiver appointed by the court. While he possesses some powers commonly conferred upon a receiver, and in many respects is subject to the direction of the court, he nevertheless carries out directly and indirectly his own official capacity a legislative policy. His chart is the legislative mandate as declared in the statute.'"

Similarly in IN RE CHETWOOD, 165 U. S. 443, 17 S. Ct. 385, 41 L. Ed. 782, it was held that a receiver appointed by the Comptroller of the Currency, under statutory power, was not an officer or agent of the court, and that his custody was not the custody of the court. Here upon the insolvency of a national bank, a receiver was appointed by the Comptroller of the currency. Thereafter a petition in equity was filed in the state court by Chetwood and prosecuted to judgment. The Federal Receiver sought an injunction in the District Court (amongst other matters) restraining Chetwood from proceeding further. Chetwood

violated this order and was adjudged in contempt. Writ of certiorari was allowed to bring up the record so that the order adjudging Chetwood in contempt be revised and annulled. The receiver contended that the Federal Court had exclusive jurisdiction because after his appointment by the Comptroller he filed an application in the Federal Court for the sale of personal property of the defunct institution.

On page 787, the Court said:

> "The filing of a petition by a national bank receiver in a Federal Court does not operate to make him an officer of that court, *or to place the assets of the bank within the control of the court in the sense in which control is acquired where a receiver is appointed by the court.*"

All of the cited cases and many more similarly decided but not cited for the purpose of avoiding surplusage, hold, that the possession of a statutory receiver is not the possession of the court. Not one case has been found placing a statutory receiver in the position of an ordinary equity receiver for the purpose of conferring jurisdiction upon a court.

It is submitted that IN RE CHETWOOD is in perfect accord with Judge Woolley's test of acquisition of jurisdiction in WARD v. FOULKROD, *supra*.

In the recent case of PENN GENERAL CASUALTY CO. v. PENNSYLVANIA EX REL. SCHNADER, October Term, 1934, No. 431, Justice Stone clearly draws this distinction. In that case a bill for the appointment of receivers was filed in the Federal Court on November 17, 1933. On December 8, 1933, while the federal action was pending the Attorney General of Pennsylvania in pursuance of statute filed a suggestion in the state court that the company was insol-

vent and prayed for a rule to show cause why the Insurance Commissioner should not take possession of the company and for an injunction. The company filed an answer setting forth the pendency of the Federal action. The State Supreme Court affirmed the decree of the lower court that liquidation proceed through the Insurance Commissioner. However, the United States Supreme Court reversed this finding because the state court inadequately treated the question of priority of jurisdiction. The opinion of Stone, Jr., said:

> "Where the assertion of jurisdiction by the two courts is nearly simultaneous, it becomes important, as in the present case, to determine the precise time when the jurisdiction attaches. If the two courts do not have substantially the same purpose, and thus the jurisdiction of the two courts may not be said to be strictly concurrent, and if neither court can act effectively without acquiring possession and control of the property *pendente lite*, the time of acquiring actual possession may perhaps be the decisive factor. Compare MORAN v. STURGES, *supra*, 284; HARKIN v. BRUNDAGE, *supra*, 43. But when the two suits have substantially the same purpose and the jurisdiction of the courts is concurrent, that one whose jurisdiction and process are first invoked by the filing of the bill is treated as in constructive possession and as authorized to proceed with the cause. HARKIN v. BRUNDAGE, *supra* 43-45. *Jurisdiction thus attaches upon the filing of the bill of complaint in court, at least where process subsequently issues in due course.* PALMER v. TEXAS, *supra* 129; FARMER'S LOAN AND TRUST CO. v. LAKE STREET ELEVATED R. CO., *supra* 60; compare SMITH PURIFIER CO. v. MCGROARTY, 136 U. S. 237, 240. The confusion and uncertainty are thus avoided which might otherwise result from the attempt to resolve the troublesome question of what constitutes actual

possession and *to determine priority of service of process in the two suits.*"

The language of Judge Davis in the opinion in the Circuit Court of Appeals clearly distinguishes between the filing of a certificate of possession which merely is a notice of an administrative act, and the filing of a bill of complaint. The former cannot confer jurisdiction because it does not invoke the jurisdiction of a particular court; the latter may—a sound check apparently being whether or not the filing of the bill results in some act of dominion by the court to indicate control over the res, as the appointment of a receiver or issuance of injunction.

So in O'NEIL v. WELCH, 245 Fed. 261 (C. C. A. 3rd Circuit 1917) the state court was found to have prior jurisdiction, not because the Insurance Commissioner had first applied to the state court to take over the assets of a defunct corporation, before the bill was filed in the Federal court for the appointment of a receiver, but because "process issued in due course" out of the state court following the Insurance Commissioner's application.

In this case, under the PENNSYLVANIA ACT 1911 P. L. 599, it was provided that whenever any domestic insurance company is insolvent, the insurance commissioner, may through the attorney general apply for an order directing such corporation to show cause why the insurance commissioner should not take possession of its property, conduct its business and distribute its assets. The insurance commissioner, by the attorney general, filed a suggestion in the state court and obtained a rule directing the insurance company to show cause why *the court* should not take possession of its property and why the court should not order liquidation of its business and dissolution of the Company.

The order read: "Pending the further order of this court, the said Union Casualty Insurance Company of Phil-

adelphia, Pennsylvania, its officers and employees are *hereby enjoined and restrained* from transacting any of the business of said company or disposing of any of the business of said company or disposing of any of its property" (Could there be any doubt that from such an order the court must find an act of dominion indicating control over the res?) Prior to the hearing on the rule to show cause, but after it had been granted, a non-resident stockholder filed a bill in the Federal Court, praying a dissolution of the corporation and distribution of its assets, and a Receiver was appointed by the Federal Court. The petition of the Attorney-general to the District Court seeking revocation of the appointment of Federal receivers was dismissed in the District Court, but reversed in the Circuit Court of Appeal. The Circuit Court in reversing the lower court did so on a single question; which court had first acquired jurisdiction. The Court said:

> "We must, therefore, inquire with some care into the subject matter of the State action before we can determine *when* the State court acquired jurisdiction and whether it was deprived of it by the subsequent action of another court.
>
> Given briefly, the Insurance Commissioner, acting through the Attorney General, files in a State court a suggestion of the corporation's insolvency or unlawful conduct. In this way, the State acts and in this way the State begin suit. Upon the State's suggestion, the Court starts a judicial inquiry by directing to the insurance company a rule to show cause why the insurance commissioner should not take possession of this property, and at the same time the Court, if it wishes, lays its hand upon the company's property and by a restraining order holds it within its control, pending the inquiry."

To what extent a statutory receiver must proceed in

court for the purpose of invoking the jurisdiction of that court is clearly demonstrated by WELCH v. O'NEIL. When contrasted with the mechanical act done in the instant case by the Secretary in filing his certificate, independent of any act of the court, the distinction becomes very clear.

The content of the Banking Code of 1933, moreover, indicates a clear legislative intent that closed institutions (but only so far as the general assets are concerned, that is the assets for the benefit of depositors and creditors only) were to be managed solely by the Secretary or his deputies. It is a paternalistic act by which the state has appointed a representative to guard the bank deposits of its citizens. It is to this agent that the Executive Department of the Commonwealth of Pennsylvania, under the statute, will turn for an accounting and he only is the responsible party. The court or courts where certificates of possession may be filed are completely outside this picture. On the other hand the Legislature has specifically directed the Courts not to impose upon the Secretary any duties inconsistent with the provisions of the act.

We, therefore, contend that the possession of the Secretary of Banking is not the possession of the State court so that the appointment of federal receivers in the instant case can raise no question of conflict of prior jurisdiction by a state court; that the mere fact that the state statute defines the secretary as a "receiver" limits him to the status of a "statutory receiver" as shown by the decisions and that definitely such a receiver is not an arm of a state court; that finally, the effect of filing a duplicate certificate of possession does not bring the res of the mortgage trust pool within the jurisdiction of a state court but amounts only to a public notice that the Department of Banking has taken possession of an insolvent institution.

By Section 606 quoted in full at page 24 of this brief, it is provided that:

"No court shall impose upon the Secretary as receiver any duties or restrictions which are in conflict with the provisions of this act."

It is submitted that such legislation is incompatible with a theory which attempts to make of a statutory officer an equity receiver; inconsistent with a theory which seeks to make the possession of such agent of the State, the possession of the Court in which he has filed his certificate of possession.

III. The Statutory Provisions for the Appointment of a Substitute Fiduciary for Mortgage Trust Pools in the County Court Is Not an Exclusive Remedy Where a Non-Resident Is Concerned.

Appellants contend (P. 16 of their Brief) that the system for the liquidation of banks through an administrative agency of the Government is an exclusive one. *This argument is not applicable to the instant case for we are here concerned with a fund which is definitely not to be liquidated by any administrative agency of the government.* For the purpose of accurately stating the question, however, we submit it as follows: Is the provision in the state statute that applications for the appointment of a substituted fiduciary be presented in the court where the secretary has filed his duplicate certificate of possession, an exclusive remedy?

In support of the exclusiveness of such a state system the case of PORT NEWARK NATIONAL BANK OF NEWARK v. WALDRON, 46 F (2nd) 296, (C. C. A. 3rd Circuit (1930)) is cited. In that case, the Chief National Bank Examiner had been examining the condition of a national bank which was in financial difficulties. On August 7, 1930, he conferred with the officers of the bank upon an offer by another bank to take over the insolvent institution and assume its liabilities. At five o'clock that evening, a stockholder of the

bank presented a bill to the district judge in chambers alleging the insolvency of the bank and praying for a receiver and an injunction. A decree issued accordingly. The next morning the Comptroller of the Currency, learning of this fact appointed a receiver for the bank in accordance with the U. S. statutes. The conflict then, involved no other jurisdiction but that of the Federal Court. The Circuit Court of Appeals decided that the Receiver of the Federal Court be discharged upon the primary ground that the Comptroller had already begun to function under the statute.

The following quotation is from the Waldron case:

> "In the present case we regard the Comptroller at the time this bill was filed as having complete dominion over, and, by his bank examiner, full legal control of, the then and future operations of the bank, and that such situation might ultimately require the appointment of a receiver. Consequently, the court below, when the bill was filed, acquired no jurisdiction to shear the Comptroller of the statutory power to take the further step of appointing a receiver."

That court held that when the bill was presented in the Federal court, the Comptroller was already in possession of the insolvent bank; further, that the real contest was between the judicial and executive branches of the same sovereignty, and, when that sovereignty had given one branch exclusive control the other could not interfere.

The Waldron case, if anything, supports the District Court appointing receivers in the instant case. We have heretofore argued that the Secretary of Banking is a statutory receiver and as such his possession is not the possession of a state court; that the filing of the duplicate certificate of possession is insufficient to bring the res within the jurisdiction. The Federal Court sitting in equity had

jurisdiction because complainant's interest was within the required sum and there was diversity of citizenship. The appointment of receivers was the first exercise of jurisdiction and under the cases confers exclusive jurisdiction upon the Federal court. The subsequent attempt to exercise jurisdiction was by the Common Pleas Court of Chester County as a result of the filing of a petition for the appointment of a substituted fiduciary. Comity required the state court to refrain from acting—that the federal court having exercised jurisdiction, retained it conclusively.

We are here concerned with courts of concurrent jurisdiction. The cases are legion to the effect that when federal courts first exercise jurisdiction they can retain it to the end.

COMMONWEALTH OF PENNSYLVANIA v. PENN GENERAL CASUALTY Co., *supra;*
HARKIN v. BRUNDAGE, 276 U. S. 36, 48 Sup. Ct. 268; 72 L. ed. 457;
PONZI v. FESSENDER, 258 U. S. 254, 66 L. ed. 607, 42 Sup. Ct. Rep. 309;
COVELL v. HEYMAN, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. 355;
FARMERS' LOAN AND TRUST Co. v. LAKE STREET ELEVATED RAILWAY Co., 177 U. S. 51, 44 L. ed. 667, 20 Sup. Ct. Rep. 564;
RICKEN LAND & CATTLE Co. v. MILLER & LUX, 218 U. S. 258, 54 L. ed. 1032, 31 Sup. Ct. Rep. 11;
WELCH v. O'NEIL, *supra;*
FARREL v. STODDARD, 1 Fed. (2) 802 C. C. A. 2nd Circuit (1924).

The general rule is succinctly stated by the late Mr. Chief Justice Taft in the case of HARKIN v. BRUNDAGE, *supra*:

"The principle which should govern in a conflict of jurisdiction like this has been a number of times

stated by this court. As between two courts of concurrent and co-ordinate jurisdiction, the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain it without interference and cannot be deprived of its right to do so, because it may not have obtained prior physical possession by its receiver of the property in dispute."

The other cases cited by appellants to support the exclusiveness of the state administration system are AMOS v. TRUST CO., *supra*, and BANK OF BAY BISCAYNE v. HANKINS, *supra*. These cases we have already analyzed and submit are not applicable for the reason that in both cases the facts involved interference with a *state official* liquidating the general *assets* of a defunct institution whereas in the instant case the Secretary is not liquidator of the mortgage trust pool, nor could he be, nor had any liquidator of the fund been appointed at the time of the filing of the bill.

What then is the effect of the Pennsylvania statute which limits the forum to the state court? We submit the general rule to be that the right of a non-resident to seek an existing equitable remedy in a Federal court, may not be abrogated by a state statute.

The District Court derives its power from the Constitution and from Congress and not from the Commonwealth. Article 3, section 2, of the Constitution provides that:

"The judicial power shall extend . . . to controversies . . . between citizens of different states."

Congress pursuant to this authority, has provided that District Courts shall have original jurisdiction of all suits of a civil nature at common law or in equity, where the matter in controversy exceeds, exclusive of costs and interest, the sum or value of $3,000.—and is between citizens of

different states, Section 24, Judicial Code (28 U.S.C.A. Sec. 41). This is the source of the jurisdiction and power of the District Court in this case. The federal court will give effect to the laws of a state provided there is no invasion of its own jurisdiction nor impairment of the rights of non-residents.

In O'NEIL *v.* WELCH, *supra*, Judge Woolley said:

> "It cannot be doubted that the Federal Court, in the exercise of its general equity jurisdiction, has power to appoint a receiver on a stockholder's bill, determine a corporation's solvency and distribute its assets, and that no state statute can impair or destroy that power."

This quotation voices the vast authority which has ruled that the jurisdiction conferred upon the Federal courts by the Constitution and Congress, cannot be infringed by state legislation which attempts to confer exclusive jurisdiction of such controversy upon its own courts and administrative bodies, by prescribing exclusive method of commencing or conducting litigation.

KLINE v. BURKE CONSTRUCTION Co., 260 U. S. 226, 43 Sup. Ct. 79, 67 L. ed. 226.

MCCLELLAND v. CARLAND, 217 U. S. 268, 54 L. ed. 762, 30 Sup. Ct. Rep. 501.

CHICOT COUNTY v. SHERWOOD, 148 U. S. 529, 13 Sup. Ct. 695, 37 L. ed. 546.

MORRIL v. AMERICAN RESERVE BOND Co., 151 F. 305, 313, C. C. A. 8th Circuit (1907).

NATIONAL SURETY COMPANY v. STATE BANK OF HUMBOLT, 120 F 593, 602 C. C. A. 8th Circuit (1903).

In the NATIONAL SURETY CASE, *supra*, the court said:

"This right and this jurisdiction were not conditioned by the fact that the complainants had or had not like remedies in the state court."

In the MORRIL CASE, *supra*, the court said:

". . . and no state, by conferring exclusive jurisdiction of such issues upon its own courts, by prescribing exclusive methods of commencing or of conducting litigation, by prohibiting the seizure of the subject of the litigation during its pendency, or by any other means, may lawfully strike down that right or take away the plenary power of the national courts to conduct the litigation, to administer their remedies, and, in the exercise of their judicial discretion, to control the possession of its subject-matter during its pendency in accordance with their established rules of practice, and finally to adjudicate the claims of the parties and to enforce their judgments."

Nor where a state statute provides a remedy, need such relief be first exhausted before seeking federal jurisdiction.

RAILROAD AND WAREHOUSE COMMISSION OF MINNESOTA ET AL *v.* DULUTH STREET RAILWAY COMPANY, 273 U. S. 625, 71 L. ed. 807.

Finally, it is submitted that there is no line of decisions, as appellants contend, that should restrain the exercise of jurisdiction by the Federal court, in a case such as this. The fact that the Chester County Trust Company may be what the Attorney General of Pennsylvania terms a "quasi-public" institution is irrelevant under the analysis of the statutes as we have presented it. For decisions like AMOS v. TRUST CO., *supra*,—while they discuss and are perhaps influenced by the fact that the corporation

is one affected with a public interest,—are primarily concerned with the fact that the State has appointed an official, as well as describing a procedure of liquidation, and it is this agent of a Sovereignty who is to be the final liquidator of the general assets of the institution. In the instant case the secretary cannot be the liquidator, but a successor to the defunct bank is to be selected by the beneficiaries of the fund or by a Court of competent jurisdiction. If Federal receivers were asked for the Banking institution itself, then appellants' argument would be in point.

There are no decisions to the effect that a Federal court, having jurisdiction, should refrain from exercising jurisdiction because the corporation for which receivers are concerned is quasi public. Indeed, there is no reason for such contention for the very fact that public interests are involved in an appeal to a Chancellor should motivate him to a more flexible exercise of power and more readily grant relief. To this effect is the following statement in Fletcher's Cyclopedia Corporations Vol. 8, p. 8855:

> "It may be said that, in determining the propriety of appointing a receiver, the nature of the corporation is usually of little or no importance, subject to the exception that (1) loss to the public may authorize the appointment of a receiver in the case of a quasi public corporation whereas no such element enters into the question of appointing a receiver for a strictly private corporation. . . "

The Pennsylvania decisions are in accord. In COWAN v. PENNSYLVANIA PLATE GLASS COMPANY, 184 Pa. 1, 38 Atl. 1075, the court said:

> "Necessarily the effect of the appointment of a receiver on the rights and remedies of creditors of private corporations must in many cases be different from that on the rights and remedies of creditors of a public

corporation. In the case of a private corporation, the public has no interest which gives it the right to be heard; any averment that will avail to create a receivership must be such as will show that a receivership is necessary to protect and promote the interest of stockholders and creditors."

B. THE BILL IN EQUITY REQUESTING RECEIVERS FOR THE MORTGAGE POOLS WAS NOT AN ACTION AGAINST THE STATE OF PENNSYLVANIA.

The Eleventh Amendment to the Constitution of the United States provides that, "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State".

This amendment resulted from the decision of the Supreme Court in CHISHOLM v. GEORGIA, 2 Dall. 419, 1 L. ed. 440, which held that under Article III, Section 2, (1), of the Constitution, the Federal judicial power extended to suits against a State brought by citizens of another state.

The Eleventh Amendment was proposed by Congress on March 4, 1794, when it passed the House (4 Ann. Cong. (3rd Cong. 1st Sess.) 477), having previously passed the Senate on January 14 (Id. 30, 31). It appears officially in 1 Stat. 402. The ratifications of but six states appear among the official records printed in 2 Doc. Hist. Const. 392-407. The fifth of these (North Carolina) was on February 7, 1795. In a message by President Washington on January 8, 1795 (1 Mess. and papers of pres. 174) the ratifications of three others were announced to Congress. Rhode Island ratified at the session of its legislature held in March 1794 (R. I. Laws—(March, 1794) 32). New Hampshire's ratification occurred on June 20, 1794 (N. H.

Laws, 1785-1796, P. 501). Georgia ratified on November 29, 1794 (Dg. Georgia Laws, 1755-1800, P. 291); and Delaware ratified on January 22, 1795 (2 Del. Laws (Ed. 1797, 1199, 1200)). North Carolina was, therefore, the twelfth state (at that time there were fifteen states) and the amendment became effective on February 7, 1795. On January 8, 1798, President Adams, in a message to Congress, stated that the amendment had been adopted by three-fourths of the states (by that time there were sixteen) and might now be declared a part of the Constitution (1 Mess. and papers of pres. 260).

At the time of its adoption, the Eleventh Amendment was intended to reach only the situation found in Chisholm v. Georgia, supra, where the state of Georgia was the actual defendant. In fact, as late as 1824, when OSBORN V. BANK OF UNITED STATES, 9 Wheat 738, 6 L. ed. 204, was decided, and even later, it was held that the court would look only to the record to see who were the parties.

However, since POINDEXTER V. GREENHOW, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, was decided, it has been the practice of the court, in actions against State officers, to consider the nature of the case.

For the purposes of this brief, a careful examination has been made of the cases involving state officers decided during the past one hundred years, and the results of this study, which will now be set forth, prove conclusively that the instant suits are not against the Commonwealth of Pennsylvania.

It has been almost universally held that it is not the character of the defendant's office, but the nature of the suit or of the relief demanded, which determines whether a suit is one against a state.

A number of cases have been found in which suits against governors were allowed. So, in ROLSTON ET AL. V. CRITTENDEN ET AL., 120 U. S. 390, 30 L. ed. 721, 7 Sup. Ct.

Rep. 599, *it was held that a suit to compel the governor to do what a state statute requires him to do is not a suit against the state within the Eleventh Amendment.* Mr. Chief Justice Waite said (30 L. ed. at 728):

> "It is next contended that this suit cannot be maintained because it is in effect a suit against the state, which is prohibited by the Eleventh Amendment of the Constitution of the United States, and Louisiana v. Jumel, 107 U. S. 711 (27: 448) is cited in support of this position. But this case is entirely different from that. There the effort was to compel a state officer to do what a statute prohibited him from doing. Here the suit is to get a state officer to do what a statute requires of him."

And in MOTT v. PENNSYLVANIA R. Co., 30 Pa. 9, 72 Am. Dec. 664, where a statute directed that certain state property be sold at auction by the governor, the court doubted the power of the legislature to impose this duty upon him and considered that if he consented to make the sale, he would be acting ministerially and might be enjoined from making the sale subject to certain conditions prescribed by statute.

Actions against the governor of a state were held not to be actions against the state, in DAVIS v. GRAY, 16 Wall. 203, 21 L. ed. 447, and in COBB v. CLOUGH, 83 Fed. 604 (C. C., D. Minn., Third Div. 1897). In the former, the governor of Texas was made a party, and in the latter the governor of Minnesota.

In PENNOYER v. MCCONNAUGHY, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699, where the suit was held not to be an action against the State of Oregon, one of the defendants was the Governor of that State.

As has already been stated, the material fact in determining whether a suit against an officer is a suit against the state depends not upon the character of the defend-

ant's office, but upon the nature of the suit or of the relief demanded.

Where the purpose of the suit is to compel a state officer to pay the state's money on the state's obligation, or to perform a contract entered into with the State, or to do any act which affects the state's property rights, the action is one against the state. Th cases upon which appellants rely are cases in which such relief was requested, and, of course, the court refused to grant the relief.

In the instant case, however, it is obvious that the appointment of the Receivers by the United States District Court does not in any way affect any property interest of the Commonwealth of Pennsylvania, nor does it impair the State's Sovereignty.

A number of cases in which it was held that the actions were against states will now be discussed, in order to distinguish them from the instant cases.

First of all, there are the cases which arose in the Reconstruction period after the Civil War, when many Southern States enacted laws and constitutional amendments which were intended to repudiate part of the public debt. Unquestionably, the contracts entered into between the states and the bond holders were broken by these enactments, and the constitutional rights of the persons affected were violated.

Considerable litigation followed and a number of cases found their way to the Supreme Court of the United States. In most cases suit was brought against state officers, but in HANS v. LOUISIANA, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504, the action was against the defaulting state itself. Hans, a citizen of Louisiana, instituted suit in the federal circuit court for the Eastern District of Louisiana to recover the interest due upon certain state bonds held by him. The plaintiff contended "that he, being a citizen of Louisiana, is not embarrassed by the

obstacle of the eleventh amendment, inasmuch as that amendment only prohibits suits against a state which are brought by the citizens of another state, or by citizens or subjects of a foreign state". Of course, the plaintiff's contention was denied, and the court held that the action was prohibited by the Eleventh Amendment.

In EX PARTE AYERS, 123 U. S. 443, 8 Sup. Ct. Rep. 164, 31 L. ed. 216, certain British aliens filed a bill in the Federal Circuit court and obtained an injunction against the bringing of certain suits by the state's attorneys. The State of Virginia had issued bonds in 1871 and 1879 bearing negotiable interest coupons which the state contracted should be received at par in payment of taxes. In 1887 a Virginia statute was passed which forbade the acceptance of these coupons until their genuineness had been established in a suit for taxes by the state's attorneys. Ayers, the attorney-general, and others disobeyed the injunction order, and were taken into custody for contempt. A petition for a writ of habeas corpus was filed and the petitioners were discharged on the ground that allowing the injunction to stand would be enforcing the contract with the state. But Mr. Justice Matthews pointed out that (31 L. ed., at 229):

> "It may be asked what is the true ground of distinction, so far as the protection of the constitution of the United States is invoked, between the Contract rights of the complainant in such a suit, and other rights of persons and of property. In these latter cases it is said that jurisdiction may be exercised against individual defendants, notwithstanding the official character of their acts, while in cases of the former description the jurisdiction is denied".

Again, (31 L. ed. at 230) the learned Justice said:

> "But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants . . . nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest."

The paragraph given above is quoted with approval in FITTS v. MCGHEE, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269, a case cited in the appellants' brief, and which will be discussed later.

In LOUISIANA v. JUMEL, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128, another repudiation case, where the suit was held to be one against the State to enforce a contract, Mr. Chief Justice Waite nevertheless pointed out that (27 L. ed. at 453):

> "The relators do not occupy the position of creditors of the state demanding payment from an executive officer charged with the ministerial duty of taking the money from the public Treasury and handing it over to them and, on his refusal, seeking to compel him to perform that specific duty."

The intimation is clear, from the portion of the chief justice's opinion just quoted that, in the event supposed, relief would be granted.

In the instant case, the plaintiffs have never claimed that they occupy the position of State creditors, nor are they demanding money from the public treasury; in their bills they asked only for the enforcement of a ministerial act from a ministerial officer.

In BOARD OF LIQUIDATION ET AL. v. MCCOMB, 92 U. S. 531, 23 L. ed. 623, where the Louisiana Funding Act was

again in question, and the problem of enforcing a contract against the state was once more involved, it was nevertheless held that the state officers could be enjoined from giving new bonds to the Louisiana Levee Company, under the Act of 1875, at one hundred cents on the dollar, when the claims of other creditors were refunded at sixty cents on the dollar, because such relief would not necessitate specific enforcement of the state's contract.

Murray v. Wilson Distilling Company, 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. Rep. 458, represents another type of case in which granting relief would require the court to compel the performance by the state of a contract obligation. This is one of the chief cases relied upon by the appellants, but the following quotation from its opinion will clearly demonstrate how patently inapplicable it is to the facts in the cases now before the court.

Mr. Justice White said (53 L. ed. at 750):

"If we consider as an original question the provisions of the Constitution of South Carolina on the subject, and the terms of the statutes of that state, establishing the dispensary system, we think it is apparent that the purchases which were made by the State officers or agents, of liquor for consumption in South Carolina, were purchases made by the State for its account, and, therefore, that the relation of debtor and creditor arose from such transactions between the State and the persons who sold the liquor. . . .

"We could not, therefore, sustain the exercise of jurisdiction by the Circuit Court without in effect deciding that the State can be compelled, by compulsory judicial process, to perform a contract obligation. It is certain that, at least by indirection, the bills of complaint sought to compel the State to specifically perform alleged contracts with the vendors of liquor

by paying for liquor alleged to have been supplied. But it is settled that a bill in equity to compel the specific performance of a contract between individuals and a State cannot, against the objection of the State, be maintained in a Court of the United States".

Before leaving the decisions involving contracts with the state, the court's attention will be called to one case where the injunction was granted, although it meant, in effect, negative specific enforcement of the State's contract.

PENNOYER v. MCCONNAUGHY, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699.

Under an Oregon Act regarding swamp lands, applications were made for the purchase of certain lands and the money was paid, but no patents were issued therefor.

Thereafter, the legislature passed an act voiding all such contracts. Suit was brought, but the court held it was not against the State. The purpose of the suit was to restrain and enjoin the officers from selling and conveying the land in question, to which the plaintiff asserted title.

Mr. Justice Lamar (35 L. ed. at 368):

"Little remains to be done or said by us in this connection, except to apply the principles announced in the cases we have attempted to review to the facts in the case before us, as set forth in our introductory statement. In this connection, it must be borne in mind that the suit is not nominally against the governor, Secretary of State and Treasurer, as such officers, but against them collectively, as the board of land commissioners. It must also be observed that the plaintiff is not seeking any affirmative relief against the State or any of its officers. He is not asking that the State issue patents to him for the land

he claims have been purchased, nor is he seeking to compel the defendants to do and perform any acts in connection with the subject matter of the controversy requisite to complete his title. All that he asks is, that the defendants may be restrained and enjoined from doing certain acts which he alleges are violative of his contract made with the State when he purchased the lands."

In UTAH CONSTRUCTION CO. v. STATE HIGHWAY COMMISSION OF WYOMING, 16 F. (2d) 322, the suit was clearly against the State itself. It was there held (p. 324):

"The contract itself by its caption recites that the agreement is between the State of Wyoming acting through the state highway commission and the plaintiff."

Obviously, in the instant cases, there is no such situation. Yet the appellants rely upon the Utah case!

In INTERNATIONAL POSTAL SUPPLY CO. v. BRUCE, 194 U. S. 601, 48 L. ed. 1134, 24 Sup. Ct. Rep. 820, an injunction to a patentee was denied against the use, by a Federal postmaster under the direction of the postoffice department, of an infringing machine of which the United States was a lessee in possession. In that case a distinct and acknowledged property interest of the United States was involved, yet Mr. Justice Harlan wrote a dissenting opinion in which he said (48 L. ed., at 1141):

"I am of opinion that every officer of the government, however high his position, may be prevented by injunction operating directly upon him, from illegally injuring or destroying the property rights of the citizen; and this relief should more readily be given when

the government itself cannot be made a party of record."

Although in this case an officer of the United States, and not of a state, was involved, Mr. Justice Harlan's dissenting opinion forcibly illustrates the great hesitation which members of this learned court have always experienced against concluding that a certain action interferes with the sovereignty of a government, whether state or federal.

Several cases relied upon by the appellants will now be discussed.

In FITTS v. MCGHEE, 172 U. S. 516, 43 L. ed. 535, the statute in question fixed bridge tolls and provided penalties for violations thereof. An injunction was granted by the Federal court restraining Oates, as Governor of the state of Alabama, and Fitts, as attorney-general of the state of Alabama, and others, from proceeding under the statute. Therefore, executive officers of the state of Alabama were enjoined from the performance of discretionary acts. It will be shown later that the Secretary of Banking of the Commonwealtth of Pennsylvania is a mere administrative officer, acting, so far as concerns us, in a purely ministerial capacity.

Furthermore, in Fitts v. McGhee, supra, Mr. Justice Harlan pointed out that it was not claimed by the plaintiffs that the defendants were committing a wrong against the plaintiffs' property. If that were claimed, said the learned Justice, (43 L. ed., at 541):

"... they could not resist the judicial determination, in a suit against them, of the question of the right to such possession, by simply asserting that they held or were entitled to hold the property in their capacity as officers of the state".

In LANKFORD v. PLATTE IRON WORKS Co., 234 U. S. 461, 59 L. ed. 316, Mr. Justice McKenna delivered the majority opinion (the decision was five to four) in which he held that the suit against the state banking board to compel the board to pay out of the depositors' guaranty fund or to issue a certificate of indebtedness, was a suit against the state of Oklahoma. But the distinction between that case and the instant cases is manifest. Mr. Justice McKenna referred to a decision of the Supreme Court of Oklahoma construing the statute in question, where it was held "that the depositors' guaranty fund . . . is as much a fund of the State as the common school fund".

Mr. Justice McKenna, referring to this decision, said (59 L. ed., at 320):

> "From this decision it appears that the law intended to give to the State as definite a title to the depositors' guaranty fund as to the common school fund: as definite, therefore, as the title of South Carolina to the assets of the State dispensary, which was the subject of decision in Murray v. Wilson Distilling Co."

Under the banking laws of Pennsylvania there is no possible room for a similar argument; namely, that the assets of the mortgage pools under consideration are as much funds of the Commonwealth as are recognized state funds. Nor is there any state decision similar to that of the Supreme Court of Oklahoma. But even if there were, the difference between the instant cases and the Lankford case would be unmistakable.

Even in the Lankford case, Mr. Justice Pitney, speaking for the minority of four, showed that the action was not against the State (59 L. ed., at 328):

> "For, if the action is not nominally or in effect a suit against the state, is not brought to enforce any liability or duty of the State or interfere with its property, but has for its object merely to require State officers to perform a plain official duty, not of a political nature, owing to a special class of persons, among whom the plaintiff is included it is not properly to be deemed a suit against the state within the prohibition of the Eleventh Amendment."

Again, speaking for the majority, Mr. Justice McKenna said (59 L. ed., at 319):

> "Where the State should vest the title to the fund for the purpose of its administration was immaterial to the essence of the power to create the fund. Whether the State should commit it to the *mere ministerial administration of the bank commissioner and banking board,* and subject them to controversies with depositors, or draw around them the circle of its immunity, was a matter within its competency to determine, and we are brought to the question of interpretation—which has the State done?"

To conclude the discussion of this case, if under the statute title to the fund had not been placed in the State, the action would have been allowed against the ministerial bank commission and banking board.

The appellants, as has already been stated, rely also upon UTAH CONSTRUCTION CO. v. STATE HIGHWAY COMMISSION OF WYOMING, 16 F. (2d) 322. Two brief quotations from the case, one of which has already been given above, will clearly indicate the inapplicability of that decision to those under consideration.

On page 324 the District Judge pointed out that, "The contract itself by its caption recites that the agree-

ment is between the State of Wyoming, acting through the State highway commission and the plaintiff."

And on page 326 it was said:

". . . we find that the highway construction over which the controversy arises was initiated by a constitutional amendment, which authorized the State of Wyoming to go into the road building business. The State thereupon proceeded to carry out this new function by creating an agency through which it might efficiently act. . . .

It is difficult to conceive how any function could be more clearly regarded as an act of the state itself than is the building of state highways in Wyoming."

Before leaving the clearly distinguishable cases in which it was held that the suit was against the state, we shall quote from another case of this type, Smith v. Reeves.

In SMITH v. REEVES, 177 U. S. 436, 44 L. ed. 1140, Mr. Justice Harlan said (44 L. ed., at 1142, 177 U. S., at 439):

"Is this suit to be regarded as one against the State of California? The adjudged cases permit only one answer to this question. Although the state, as such, is not made a party defendant, the suit is against one of its officers as treasurer; the relief sought is a judgment against that officer in his official capacity; and that judgment would compel him to pay out of the public funds in the treasury of the State a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the State for the amount specified in the complaint. *This case is unlike those in which we have held that a suit would lie by one person against*

another person to recover possession of specific property, although the latter claimed that he was in possession as an officer of the state and not otherwise. In such a case, the settled doctrine of this court is that the question of possession does not cease to be a judicial question as between the parties actually before the court—because the defendant asserts or suggests that the right of possession is in the state of which he is an officer or agent." (Italics ours)

A number of cases will now be discussed in which the arguments advanced that the suits were in violation of the Eleventh Amendment were rejected by the Court.

TINDAL v. WESLEY, 167 U. S. 204, 42 L. ed. 137.

Land was purchased from State Commissioners, with the concealed purpose of making payment in revenue bond scrip, in order to have judicial determination of the question of its validity. The State officers withheld possession of the land from the purchaser.

It was held that the suit was not against the state, and that the purchaser was entitled to possession.

POINDEXTER v. GREENHOW, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903.

An action of detinue for personal property, distrained by defendant for delinquent taxes, in payment of which the plaintiff had duly tendered coupons cut from bonds issued by the state of Virginia under the Funding Act of 1871. The construction of Virginia Acts of 1882 and 1884 were involved, which required the tax payer demanding to have coupons received in payment of taxes, first to pay the taxes in money, under protest, and then to sue the officer within 30 days, and on obtaining judgment to be paid back. Held for the taxpayer.

Mr. Justice Matthews (29 L. ed., at 192):

> "The ratio decidendi in this class of cases is very plain. A defendant sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it."

REAGAN v. FARMERS' LOAN & T. Co., 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. Rep. 1047. This was an action by a New York corporation against the railroad commissioners of Texas and others to enjoin the enforcement of certain railroad rates established by the statutes of Texas. The Court said (38 L. ed., at 1022; 154 U. S., at 391):

> "Nor can it be said in such a case that relief is obtainable only in the courts of the State. For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of the State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal Courts to maintain a like defense. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redresss in its own courts. *Given a case where a suit can be maintained in the Courts of the State to protect property rights, a citizen of another state may invoke the jurisdiction of the Federal courts.*"

It was objected that the suit was in effect a suit against the State of Texas. Mr. Justice Brewer said (154 U. S., at 390, 38 L. ed., at 1021):

> "There is a sense, doubtless, in which it may be said that the state is interested in the question, but

only a governmental sense. It is interested in the well being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. *Not a dollar will be taken from the Treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered.*"

SMYTH v. AMES, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

A suit in the Circuit Court of the United States against the members of the State Board of Transportation of Nebraska and other persons and corporations, to enjoin the enforcement of certain rates established by a statute of that state for railroads. In that case it was insisted that the relief sought could only be had in an action brought in the Supreme Court of Nebraska, such being the remedy provided by the statute there in question.

The court said (42 L. ed., at 838; 169 U. S., at 516):

"*The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal Court is not to be conclusively determined by the statutes of the particular state in which suit may be brought.* One who is entitled to sue in the Federal Circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court, and he cannot be deprived of that right by reason of his being allowed to sue at law in a State court on the same cause of action."

(169 U. S., at 518; 42 L. ed., at 839):

"The answer of the officers of the State in each

case insists that the real party in interest is the State, and that these suits are, in effect, suits against the State, of which the circuit court of the United States cannot take jurisdiction. . . . It would . . . be sufficient to say that these are cases of which, so far as the plaintiffs are concerned, the circuit court has jurisdiction, not only upon the ground of the diverse citizenship or alienage of the parties. . . ."

In THE UNITED STATES v. JUDGE PETERS, 5 Cranch 115, 3 L. ed. 53, it was said by Mr. Chief Justice Marshall (5 Cranch, at p. 139, 3 L. ed., at p. 60):

"In this case, the suit was not instituted against the State or its Treasurer, but against the executrices of David Rittenhouse (Treasurer of the State of Pennsylvania), for the proceeds of a vessel condemned in the court of admiralty, which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it is unnecessary to give an opinion; but it certainly can never be alleged that a mere suggestion of title in a State to property, in possession of an individual, must arrest the proceedings of the Court, and prevent their looking into the suggestion, and examining the validity of the title."

(3 L. ed., at p. 61, 5 Cranch, at p. 141):

"Since, then, the State of Pennsylvania had neither possession of, nor right to, the property on which the sentence of the District Court was pronounced, and since the suit was neither commenced nor prosecuted against that State, there remains no pretext for the allegation that the case is within that amendment of the constitution which has been cited;

and, consequently, the State of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause."

In UNITED STATES v. LEE, 106 U. S. 196, 27 L. ed. 171, the plaintiff claimed title to the land upon which Arlington Cemetery was established, which had passed to the Government under a tax sale that the plaintiff claimed was invalid, and brought suit against the officers in possession. The decision was for the plaintiff.

In the instant cases, neither possession nor title to the mortgage pools in question is in the Commonwealth of Pennsylvania. The Secretary of Banking merely has custody of the pools until a new fiduciary is appointed to take actual possession and title from the trust company. The Banking Code of 1933, supra, refers to the Secretary of Banking as a "Receiver", but it creates merely the status of a statutory receiver, for the purpose of indicating the State court which shall have jurisdiction over him when that jurisdiction is invoked.

In FARRELL v. STODDARD, 1 F. (2d) 802, in an application before the Federal court the Superintendent of Insurance of New York claimed that he was a New York court receiver, and before the State court he claimed that he represented an independent branch of the Sovereign power.

The Court said (p. 804):

"The defendant cannot well assert in the State court that he represents an independent branch of the sovereign power not subject to the Court's control, and in this court assert that he is the agent of the State Court, and that his custody is the custody of the court. The fact that the defendant's contentions in either court do not determine the law of the case is not overlooked. But the law, and defendant's conten-

tions in the State court, are against the defendant's contention in this court."

In ALLEN v. UNITED STATES, 285 Fed. 678 (C. C. A. 1st Circuit, 1923) it was said (p. 682):

"The contention that the district court was without jurisdiction because this is a suit against the State of Massachusetts is untenable. *The state claims no title to any of the property of the trust company held by the Commissioner and can be in no way affected by any decree that may be entered. The real defendant in this case is the trust company.*"

And on page 683, it was said:

"Here neither the State of Massachusetts nor the bank commissioner are asserting any title to the assets of the trust company."

Clearly, the State had no interest in the fund.

It is submitted that the Secretary of Banking is not an executive officer of the Commonwealth of Pennsylvania, but a mere administrative officer engaged in the performance of a ministerial duty.

THE ADMINISTRATIVE CODE OF 1929; ACT OF APRIL 9, 1929, P. L. 177, provides:

"201. *Executive Officers.* Administrative Departments, and Independent Administrative Boards and Commissions.—The executive and administrative work of this Commonwealth shall be performed by the Executive Department, consisting of the

Governor,
Lieutenant Governor,
Secretary of the Commonwealth,
Attorney General,

Auditor General,
State Treasurer,
Secretary of Internal Affairs, and
Superintendent of Instruction;
by the Executive Board and the
Pennsylvania State police;

by the following *administrative departments.*

. . . . . .

Department of Banking."

"Section 206. Department Heads.—Each administrative department shall have as its head an officer who shall, either personally, by deputy, or by the duly authorized agent or employe of the department, and subject at all times to the provisions of this act, exercise the powers and perform the duties by law vested in and imposed upon the department.

(a) The following officers shall be the heads of the administrative departments following their respective titles:

Secretary of the Commonwealth, of the Department of State;

Attorney General, of the Department of Justice;

. . . . . .

Secretary of Banking, of the Department of Banking."

ARTICLE IV, SEC. 1, OF THE CONSTITUTION OF THE STATE PENNSYLVANIA provides as follows:

"The Executive Department of this Commonwealth shall consist of a Governor, Lieutenant Governor, Secretary of the Commonwealth, Attorney General, Auditor General, State Treasurer, Secretary of Internal Affairs and a Superintendent of Public Instruction."

In addition to the sections quoted above, which prove conclusively that the Secretary of Banking is merely an administrative, and not an executive officer, there is the further fact that the Secretary of Banking is not a member of the Executive Board. The Executive Department is composed of the Governor, the State Treasurer, the Auditor General, the Secretary of Highways, the Attorney General, the Secretary of Revenue and the Secretary of Property and Supplies.

When we come to the distinction between ministerial and discretionary acts, we find that great confusion exists in the cases, so far as definitions are concerned, although usually the correct result is reached. When a court says the act is ministerial, it means that judicial control over such acts will not unduly invade other branches of the government.

The most lucid and masterly treatment of the subject is that of Edwin W. Patterson, in his article "Ministerial and Discretionary Official Acts", 20 MICHIGAN LAW REVIEW 848. On page 854, Mr. Patterson says:

> ". . . Human action always involves the exercise of some judgment or discretion.
>
> "But it may be said, 'judgment' or 'discretion' means something more than a mere mental operation; it involves intelligent choice between two courses of action, where the decision is doubtful or difficult of ascertainment. In short, the difference is merely one of degree. This explanation, while inconsistent with the dogmatic form in which the distinction is usually stated may serve to point to a class of clerical acts which are 'ministerial', such as entering figures in a book, or copying a deed into the records. That is, granted that the act is to be done, the details as to which the official exercises judgment or discretion—the kind of pen he will use, whether he will write in long hand or with a

typewriter—are such that his choice does not affect individual interests, and in this sense the 'discretion involved' in doing such an act, is so unimportant that it may be ignored. . . .

The recorder of deeds, for instance, when an instrument is presented for record, must interpret the recording act, and likewise interpret the instrument, and apply the statute to the particular facts; the Sheriff in levying on personal property must ascertain that the judgment debtor is the owner of it. The 'judgment and discretion' involved in either case is the same as that which the judges exercise when the same questions are brought before them; yet they hold that the official acts 'ministerially'. Why? Is it not because tangible property rights are affected and the controversy assumes the aspect of private litigation, the kind of questions the courts are constantly deciding, and which they consider it their province to decide finally? In other words the courts regard it as a proper case for judicial control?"

In conclusion, not one case cited by the appellants in their brief supports their contention that the actions in the instant cases were instituted against the Commonwealth of Pennsylvania. The appellants' cases deal with actions where granting relief would deprive the State as a sovereignty of property in its possession, or would require the enforcement of a contract entered into with the State.

Furthermore, the District Court, in appointing the receivers, did not substitute the receivers for the Secretary of Banking. On the contrary, the receivers were substituted for the insolvent trust company, which was incapable of continuing to act as trustee!

As has been shown, the Secretary of Banking is a mere administrative officer, in custody of these mortgage pools in which the State of Pennsylvania has no propri-

etary, or any other, interest. Manifestly, the Secretary of Banking is performing a ministerial act, an act subject to judicial control, and the Decree of the District Court only compels him to perform his duty, namely, to turn over the assets of the mortgage pools to a new fiduciary, a duty imposed upon him by the statutes of Pennsylvania.

C. THE BILLS IN THE INSTANT CASES WERE FILED ENTIRELY IN ACCORDANCE WITH SECTION 24 OF THE JUDICIAL CODE, AS AMENDED BY THE ACT OF MARCH 3, 1911, C. 231, 36 STAT. 1091, 28 U. S. C. A., SECTION 41 (1).

Article III, Section 2(1), of the Constitution of the United States provides as follows:

> "The judicial power shall extend to all cases, in Law and Equity . . . between citizens of different States."

Under the power granted by this clause of the Constitution the Congress has legislated and provided that [Section 41 (1) (Judicial Code, Section 24, amended)]:

> "The district court shall have original jurisdiction . . . of all suits of a civil nature, at common-law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and . . . (b) is between citizens of different states . . . ."

Appellants' argument as to lack of diversity of citizenship constitutes mere surplusage. For the fact that the state has no citizenship within the meaning of Section 24 of the Judicial Code, as Amended by the Act of March 3, 1911 C. 231, 36 Stat. 1091, 28 U.S.C.A., Sec. 41 (1) is of little concern. If the state were the defendant, the eleventh amendment to the Constitution would be violated. And if

the Secretary of Banking stood in the place of the State of Pennsylvania, then the constitutional infringement might still be in issue. But these matters have been already presented.

That the State of Pennsylvania is not a citizen for the purposes of "diversity" may be conceded. That "William D. Gordon, Secretary of Banking and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company" may not be named defendants in an action brought by a non-resident in a Federal court has not been supported by appellants in their brief.

For their astounding proposition they refer to WESTBROOK v. DIRECTOR GENERAL OF RAILROADS, 263 Fed. 211 (D. C., N. D. Georgia) and they contend it was *held* in that case that,

> "When sued officially, neither the officer nor the Government is a citizen of any state. No jurisdiction on account of diverse citizenship exists in these cases."

However, the appellants are entirely mistaken, and the case stands for no such proposition. It arose under the Federal Control Act of March 21, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, Section 3115¾a et seq.), and the facts are set out in the opinion of District Judge Sibley.

(Page 212)

> "Four suits, each for $25,000, were brought in the State Court, for personal injuries and homicides inflicted during federal control, against "the Director General of Railroads of the United States, appointed by the President of the United States and acting under an act of Congress, and engaged in the operation of the line of the Louisville & Nashville Railroad Company."

"They were removed on the grounds: (1) That plaintiffs are citizens and residents of Georgia, and the Louisville and Nashville Railroad Company, to whom defendant succeeded in operating the railroads, is a citizen of Kentucky, and would before federal control have been entitled to remove for diverse citizenship; (2) that the cases arise under the Constitution and laws of the United States and orders of the Director General made in pursuance thereof, and *are controversies to which the United States are a party.*"

And on page 213 the District Judge said:

"*The Director General of Railroads* is not here sued as an individual, or even by name, but as an officer, and *stands for the United States, as both parties concede.*"

The suits, therefore, were admittedly against the United States!

The statement from Judge Sibley's opinion quoted in the appellants' brief is pure diction, absolutely unnecessary for the decision in the case, and for which the judge cited no authority whatsoever. Furthermore, the appellants cite no authority to support the statement.

There are five headnotes to the Westbrook case, but not a single one even refers to the sentences quoted in the brief of the appellants.

On the other hand, there is the RELF v. RUNDLE decision, which will now be discussed.

LIFE ASSOCIATION OF AMERICA, WILLIAM S. RELF, SUPERINTENDANT OF THE INSURANCE DEPARTMENT OF MISSOURI, AND DANIEL M. FROST, SPECIAL AGENT, ETC., v. SAMUEL E. RUNDLE, 103 U. S. 222, 26 L. ed. 337.

The Company was a Missouri corporation and the Missouri statutes provided that,

> "Upon the rendition of a final judgment dissolving a company, or declaring it insolvent, all the assets of such company shall vest in fee simple and absolutely in the Superintendent of the Insurance Department of this state and his successor or successors in office. . . ."

Relf commenced proceedings under the statute to dissolve the corporation and wind up its affairs. He prayed that the company be enjoined from doing business and that an agent be appointed to take charge of its property temporarily. This was on October 13.

On November 5, Rundle and wife, policy holders, commenced suit in the Fifth District Court for the parish of New Orleans, La., against the company, Frost, etc., to have the assets of the company in Louisiana declared a trust fund and applied to the claims of Louisiana creditors and policy holders in preference to others. A receiver was appointed by the State court.

On November 10th, the Company was dissolved by a decree of the Missouri court and the property was vested in Relf. On November 17, on his own motion, Relf was made a party to the suit in New Orleans, as the legal representative of the late corporation, and on November 28th he filed a petition for the removal of the case to the Circuit Court of the United States for the District of Louisiana. In his petition, he set forth his own citizenship in Missouri, and that of the appellees in Louisiana. On December 5th, the State receiver moved to dismiss the cause and strike it from the docket of the circuit court, among other reasons, "because Relf had no standing in court, he being a creature of the State of Missouri, without capacity to sue or remove causes in Louisiana". The cause was remanded, but on

appeal, the order was reversed. On Page 339, 26 L. ed., Mr. Chief Justice Waite said:

> "He (Relf) is an officer of the State and as such represents the State in its sovereignty while performing its public duties."

Nevertheless, in that capacity he was held to have citizenship for the purposes of diversity of citizenship jurisdiction. The State of Missouri itself could not have sued in the Federal court, because no Federal question was involved, and because a state has no citizenship for purposes of jurisdiction based upon diversity of citizenship.

The learned Chief Justice said further: (26 L. ed. 339)

> "...as he appeared in time and was a citizen of Missouri...he was entitled to remove the cause and require citizens of Louisiana to litigate their claims with him in the Courts of the United States."

It is submitted that every type of officer has citizenship, but that where the suit is clearly against the State, his citizenship is immaterial.

It is submitted further that whether suing or sued as an individual or officially, the citizenship of an officer is his natural citizenship. RELF v. RUNDLE, *supra*.

The appellants cite HERTZ v. KNUDSON, 6 F. (2d) 812 (C. C. A. 8, 1925). There it was held that the State of Nebraska was the party in interest, and that, therefore, the Federal court did not have jurisdiction in a suit by Knudson, deputy and acting Secretary of Trade and Commerce. The suit was originally brought alleging that the state was the party plaintiff, the complaint containing the following allegation: (P. 814)

> "That the grounds upon which this court's juris-

diction depends are the fact that *the plaintiff is the State of Nebraska*, and the defendants are citizens of another state, and that the amount involved in the suit is in excess of the sum of three thousand ($3,000) dollars."

To show diversity of citizenship, Knudson tried to substitute himself as plaintiff. The court pointed out that the state was the plaintiff, that no Federal question was involved, and dismissed the suit.

In UTAH CONSTRUCTING CO. v. STATE HIGHWAY COMMISSION, *supra*, not only did the contract itself recite that the agreement was between the State and the plaintiff, but the State had gone into the business of constructing highways, and was certainly the real party in interest.

There are a great many cases involving suits against officers where the question of lack of diversity of citizenship was not raised or discussed. Surely, the only rational answer is that it msut have been realized how unsound any such proposition would be.

It is submitted that the suits in the instant cases were entirely in accordance with the Judicial Code.

In conclusion, from some sources has come the demand that the diversity of citizenship jurisdiction of the Federal courts be abolished, or restricted in all possible ways. Not only does such a course require Congressional legislation, but in the language of Mr. Robert C. Brown, in 78 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 179, at 193:

> "If as has been shown, the exercise of this (diversity of citizenship) jurisdiction is rendering a valuable service to the country as a whole, then, if the burden of the Court is too great, the proper solution lies in an increase in the number of courts."

CONCLUSION.

It is respectfully submitted that the Federal court had jurisdiction in this litigation and that the appointment of receivers was a proper exercise of that power. The District Court opened every channel for the Department of Banking to present substantial reasons why the court should not exercise jurisdiction. The Department of Banking took the position that the court did not have jurisdiction over the res, for the reason that the statutes of Pennsylvania made the Secretary of Banking responsible only to the court in which the certificate of possession was filed and that the filing of such a certificate conferred jurisdiction upon the state court. The bill averred inter alia the consequences which would surely follow, in an unsettled real estate market, from failure to diligently pursue the collection of interest on mortgages and to compel the payment of taxes and to devote constant supervision to the real estate. The bill averred that little effort was being made by the Secretary of Banking to fulfill these requirements. These averments remained unchallenged. Only the right of the District Court to exercise jurisdiction was placed in issue by them. Under these circumstances, it is submitted, the Federal Court would have abused its discretion not to act and appoint the receivers as requested.

The power of a Federal Court in a proper case to appoint receivers for a defunct corporation upon the application of a non-resident is conceded. It is contended by appellants that the statutes of Pennsylvania providing for the liquidation of banks preclude such jurisdiction because the state court has jurisdiction over the res and secondly, providing a complete machinery for liquidation, should as a matter of policy require a Federal Court (even if it had jurisdiction) to refrain from its exercise. The second reason will be disposed of at the outset.

We have presented a complete statement and an analysis of the Pennsylvania Banking Acts. That they may set

up a complete mechanism for the liquidation of the *general assets of a bank* need not be contraverted for such a system is irrelevant to our problem. The argument must isolate itself to the specific res involved. It so happens that in Pennsylvania trust companies were creating a form of investment by participation in mortgage securities. This never formed a part of the general banking business and the Legislature of Pennsylvania in providing for the liquidation of banks took cognizance of this fact. It was, therefore, provided that in liquidating banks such funds comprising mortgage pools be set aside and the beneficiaries of the pools be notified to remove them from the bank and dispose of them as they please. Definitely then, there is no state official to liquidate this fund and accordingly a well grounded principle that would restrain a Federal Court from interfering with a statutory official in the performance of a system of liquidation has no application in the instant case.

It is next contended by appellants that the state court exercised jurisdiction over the mortgage trust pool prior to the filing of the bill in equity in the Federal Court. This argument is based upon the fact that the Secretary of Banking filed a certificate of possession with the Prothonotary of Chester County. This was carefully considered by the courts below and conclusion drawn from logic and precedent that such a ministerial act can amount to no more than notice to the county of the fact that the Secretary of Banking has taken possession of an insolvent institution. The failure to file such a certificate of possession would not affect the possession by the Secretary of Banking. No court could interfere with his possession. It is certain that such procedure does not conform to the principle resolved from innumerable decisions to the effect that a court is not exercising jurisdiction unless it has dominion of the res, and that may only be obtained by some actual act of dominion. That the Pennsylvania statutes may make

the Secretary of Banking responsible only to the state court is proper legislation providing it does not deprive a litigant, not subject to the laws of Pennsylvania, of another existing remedy. And the query may well be raised whether such exclusive remedy was contemplated by the Legislature as to these mortgage pools inasmuch as such funds are placed outside the scope of the Secretary's liquidations. In any event, it is well established that a state statute may not limit the right of a non-resident to seek relief in a Federal Court.

The position taken by the Department of Banking in this case is nebulous indeed. The Secretary of Banking is an administrative officer under the "Administrative Code" who has a duty of protecting this fund until the beneficiaries repossess it. The State of Pennsylvania, of course, has no proprietary interest to protect. If the Supreme Court should reverse the decrees appointing receivers, the Secretary of Banking would not proceed to liquidate the fund. Yet that is the very thing which did happen in all of the cases cited by appellant. On the contrary, if the federal receivers were removed, these mortgage trust pools would be turned over to fiduciaries or receivers to be appointed by the Chester County Court. Is this appellants' actual contention?

The District Court in appointing receivers, and the Circuit Court of Appeals in upholding that action, did so only after long deliberation and a careful study of the situation. That they concluded complainants were properly before them and seeking a relief which should be granted, it is submitted, was the only equitable determination.

Respectfully submitted,

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APPENDIX.

PERTINENT PENNSYLVANIA BANKING LEGISLATION.

The Banking Act of 1923, Act of June 15, 1923, P. L. 809, as Amended by Act of May 5, 1927, P. L. 762.

Section 22. *Certificate of Taking Possession.*—When the Secretary shall have duly taken possession of the business and property of a corporation or person as provided in section twenty-one of this act,[1] he shall forthwith make, under his hand and official seal, a certificate setting forth that he has so taken possession, and shall file such certificate in his office, and cause a certified copy thereof to be filed in the office of the prothonotary, who shall index the same in the judgment index under the name of the corporation or person as defendant and the name of the Secretary as plaintiff.

From and after the filing of such certified copy in the office of the prothonotary, the Secretary shall supersede any receiver previously appointed by any court for, or any assignee or trustee for creditors appointed by, such corporation or person.

. . . . . .

Section 40. *Trust Funds*—

(a) Taking Possession by Secretary.—Whenever the secretary takes possession of the business and property of a corporation or person in accordance with the provisions of this act, he shall also take possession of all funds, property, and investments held by such corporation or person in any fiduciary capacity, but shall keep the same separate and apart from the assets thereof.

(b) Substituted Fiduciaries.—Upon determining to liquidate the affairs of such corporation or person, the sec-

retary shall forthwith give written notice to all parties interested in any such funds, property, or investments held in a fiduciary capacity, so far as such notice is practicable, requiring them within thirty days to apply to the proper court or official for the appointment of substituted fiduciaries to take the place of such corporation or person. On the failure or neglect of the parties so notified to make such application within the time designated, or in case the parties in interest cannot be notified, the secretary shall himself apply for such appointment of substituted fiduciaries.

(c) Settlement Without Accounting.—In any instance where there shall be no dispute as to the amount or identity of such funds, property, or investments, and all parties in interest are sui juris, and so request in writing, the secretary may, without filing of an account, transfer, pay over, and deliver to such substituted fiduciary a receipt and release in full, which shall discharge the secretary and such corporation or person from any further liability in the premises.

(d) Jurisdiction of Disputes as to Identity of Trust Fund. In any instance where there shall be a dispute as to the identity of alleged trust funds, property, or investments, either because the same have become or are alleged to have become mingled with other funds, property, or investments, or otherwise, the court having jurisdiction of the liquidation proceedings shall have exclusive jurisdiction to determine such dispute.

(e) Accounting.—In all other instances, the secretary shall, with the least possible delay, prepare and file in the courts having jurisdiction thereof the accounts of such corporation or person in such fiduciary capacities, and shall transfer, pay over, and deliver the balances, determined upon such accounts to be due, in accordance with the orders and decrees of such courts.

Act of Pennsylvania of May 15, 1933, P. L. 565.

Section 604. *Certificates of Possession; Filing.—A.* The Secretary, upon taking possession of the business and property of an institution as receiver, shall forthwith, under the seal of the Department, prepare in duplicate a certificate, to be known as the certificate of possession, setting forth that he has become receiver of the institution. It shall state the name of the deputy receiver whom the Secretary, pursuant to the provisions of this act, appoints to take charge of the affairs of the institution, and shall set forth the duties which he delegates to such deputy receiver. If the Secretary does not appoint a deputy receiver prior to the date of the filing of the certificate of possession, or if he appoints a new deputy receiver or an additional one, or if he adds to the duties of the deputy receiver, he shall prepare, in duplicate, and file a supplement to the certificate of possession.

B. The Secretary shall file the original certificate of possession and the original of any supplement thereto in his office in Harrisburg, and the duplicate certificate of possession and the duplicate of any supplement thereto in the office of the prothonotary. The certificate of possession filed in the prothonotary's office, and any supplement thereto, shall be listed in the judgment index in the name of the institution as defendant and of the Secretary as plaintiff.

C. In addition the Secretary shall, as soon as possible, file a certified copy of the certificate of possession, and of any supplement thereto, in the office of the recorder of deeds in each county in the Commonwealth, or with the proper official in any other state or country, in which any real property shall be situated which belongs to the institution or title to which is in its name, or upon which there is a mortgage or other lien which belongs to the institution or title to which is in its name. Such copy shall be recorded

in the current deed book, and shall be indexed in the grantors' index in the name of the institution and in the grantees' index in the name of the Secretary, or it shall be filed, indexed, or registered by whatever other method is provided by the law of the particular county, state, or country in which such real property is located.

Section 712. Liens, Judgments, and Executions; Assignments of Claims.—A. The status of all parties shall become fixed on the date the Secretary takes possession of the business and property of the institution, as receiver.

. . .

ARTICLE IX.

Secretary in Possession of a Mortgage or Security Pool or of an Asset in Which Undivided Interests Are Held.

Section 901. *Mortgage and Security Pools and Participations; Accounts.*—Whenever the Secretary shall have filed a supplement to the certificate of possession, setting forth his determination to liquidate the affairs of an institution of which he is in possession as receiver, he shall, as soon as it may be convenient, file, in the court in which the certificate of possession shall have been filed, an account as to any mortgages, securities, or other assets comprising any mortgage or securities pool operated by such institution, or as to any mortgage, security, or other asset, in which undivided interests shall have been created by the institution, regardless of whether certificates of participation in such mortgage or securities pool, or in such mortgage, security, or other asset shall have been actually issued by the institution, and regardless of whether the relation of the institution to the owners of the undivided interests in such mortgage or securities pool, or in any such mortgage, security, or other asset, is technically that of a trustee.

A mortgage or securities pool shall be regarded as

having been operated by the institution, regardless of whether any or all of the mortgages, securities, or other assets in such pool shall be held in the name of the institution or in the name of the nominee of the institution. Where undivided interests have been created in any mortgage, security, or other asset by any corporation or person holding such mortgage, security, or other asset as nominee of the institution, such undivided interests shall be regarded as having been created by the institution.

The prothonotary shall not be under any duty to recopy or otherwise record any such account filed by the Secretary. He shall make no charge except the regular fee for filing such or similar papers.

Section 902. *Transfer of Pools and Participations Without Filing an Account.* If all the corporations or persons who are the owners of all the undivided interests in any mortgage or securities pool, or in any mortgage, security, or other asset in which the institution shall have created undivided interests, are sui juris, and if they shall agree to the amount asserted by the Secretary to be due him as receiver for services rendered by the institution or by him, and for expenses incurred by either, and if they shall authorize the Secretary to transfer any such mortgage or securities pool, or any such mortgage, security, or other asset to them, or to a substituted fiduciary or to any other corporation or person agreed upon by them, and if they shall execute proper instruments releasing the Secretary and the institution from any further liability to them, the Secretary may transfer to such substituted fiduciary or to such corporation or person, without filing an account, all the mortgages, securities, or other assets comprising such mortgage or securities pool or the mortgage, security, or other asset in which undivided interests have been created. In any case where the institution, as fiduciary of an estate, is the owner on behalf of such estate of any undi-

vided interest in any such mortgage or securities pool, or in any such mortgage, security, or other asset, and no substituted fiduciary has been appointed for such estate, the Secretary shall not transfer such mortgage or securities pool, or such mortgage, security, or other asset in which undivided interests were created by the institution, unless he shall also be authorized to make such transfer by all corporations or persons having an interest in the estate of which the institution was fiduciary, except that where substituted fiduciaries have not been appointed for unborn beneficiaries of the estate or for other beneficiaries who are not sui juris, the Secretary shall not be required to obtain such authority from any one in behalf of such unborn beneficiaries or other persons who are not sui juris.

Section 903. *Notice of Filing Account. A.* Upon filing an account as to any mortgages, securities, or other assets comprising any mortgage or securities pool operated by an institution of which he is in possession as receiver, or as to any mortgage, security, or other asset in which the institution shall have created undivided interests, the Secretary shall give notice thereof, in so far as it may be practicable, to all corporations or persons who are the owners of the undivided interests in any such mortgage or securities pool, or in any such mortgage, security, or other asset, and, in any case where the institution as fiduciary of an estate, is the owner on behalf of such estate of any such undivided interest, then to all corporations or persons having an interest in such estate, except that no such notice need be given to anyone on behalf of unborn beneficiaries of such estate or other beneficiaries who are not sui juris, where no substituted fiduciary has been appointed for such beneficiaries. Such notice shall be given to the corporations or persons entitled thereto under this section, at their addresses as they appear on the books or other records of the institution, or, if the address of any

such corporation or person does not appear thereon, then at the last known address of such corporation or person.

B. Such notice shall state the time and place of the audit of such account, and, except where an application for a substituted fiduciary shall have been made by any other method authorized by this act, it shall also state the intention of the Secretary to apply for a substituted fiduciary for such mortgage or securities pool, or for such mortgage, security, or other asset in which undivided interests were created by the institution, and the time and place of any hearing upon such application which may be fixed by the court.

Section 904. *Appointment of Substituted Fiduciary; Transfer of Pools or Participations upon Order of Court.* —*A.* After the filing by the Secretary of a supplement to the certificate of possession, setting forth his determination to liquidate the business and property of an institution, but either before or after the filing of an account by him as to any mortgages, securities, or other assets comprising any mortgage or securities pool, operated by such institution, or as to any mortgage, security, or other asset in which the institution shall have created undivided interests, the owner of any undivided interest in such mortgage or securities pool, or in such mortgage, security, or other asset, may file, in the court in which the certificate of possession is filed, a petition for the appointment of a substituted fiduciary for such mortgage or securities pool, or for such mortgage, security, or other asset in which undivided interests were created.

If such petition shall not have been filed by the owner of any such undivided interest within thirty days after the notice by the Secretary of the filing of an account as to such mortgage or security pool, or as to such mortgage, security, or other asset, the Secretary shall file, in the court

in which the certificate of possession is filed, a petition for the appointment of a substituted fiduciary for such mortgage or securities pool, or for any such mortgage, security, or other asset in which undivided interests were created by the institution.

Upon the filing of such a petition by the owner of any such undivided interest, or by the Secretary for such mortgage or security pool, or for such mortgage, security, or other asset in which undivided interests were created by the institution, the court shall, upon a day fixed by it, conduct a hearing upon such application, after which it shall appoint a substituted fiduciary.

B. The Secretary shall transfer to the substituted fiduciary appointed by the court all such mortgages, securities, or other assets comprising any such mortgage or securities pool, or any such mortgage, security, or other asset in which undivided interests were created, as are in his possession as receiver, and as to which he shall have filed an account. The substituted fiduciary shall take such mortgages, securities, or other assets without liability for the nature or value of the mortgages, securities, or other assets as investments. Such transfer shall be made in accordance with the order of the court, and, in directing such transfer, the court may reserve for future determination any question of surcharge against the institution or the Secretary.

The court may, after petition filed pursuant to the provisions of this section, order the Secretary to make such transfer even prior to filing an account, in which case it may also reserve for future determination any question which may arise upon the audit of the account.

SUPREME COURT OF THE UNITED STATES.

Nos. 549 and 550.—October Term, 1934.

549	William D. Gordon, Secretary of Banking, et al., etc., Petitioners, *vs.* Laura A. Washington et al., etc.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
550	William D. Gordon, Secretary of Banking, et al., etc., Petitioners, *vs.* Mary A. O'Brien et al., etc.	

[April 1, 1935.]

Mr. Justice Stone delivered the opinion of the Court.

In these cases certiorari was granted, — U. S. —, to review a decree of the Court of Appeals for the Third Circuit, 73 F. (2d) 577, which affirmed a decree of the district court overruling motions to dismiss the bills of complaint and to vacate the appointments of receivers. The questions involved are of public importance. See No. 394, *Pennsylvania* v. *Williams;* No. 395, *Gordon* v. *Ominsky;* No. 431, *Penn General Casualty Co.* v. *Pennsylvania,* decided February 4, 1935.

On February 14, 1933, petitioner, the Secretary of Banking of the Commonwealth of Pennsylvania, took possession of the business and property of the Chester County Trust Company, a Pennsylvania banking corporation. By § 21 of the Banking Act of 1923, P. L. 809, he is authorized to take possession of and to liquidate the business and property of banking corporations of the commonwealth which are in "an unsafe or unsound condition." Pursuant to § 22, he filed a "certificate of possession" in his office and on the following day filed a certified copy of the certificate with the prothonotary of the Court of Common Pleas of Chester County. When this is done, he has, by § 29, the status of a receiver appointed by any court of equity of the commonwealth.

Included in the business and property taken over by the Secretary were two trust funds, or "mortgage pools," consisting of

mortgages held by the trust company as fiduciary, against which it had issued participation certificates entitling the holder to an undivided share in the principal and interest of mortgages aggregating in excess of $2,900,000 in one pool and of $1,700,000 in the other. The Department of Banking Code of May 15, 1933, P. L. 565, which became effective July 3, 1933, provides in § 701 that the Secretary, when in possession of the business and property of a banking corporation, shall have the status of a general receiver and be responsible to the court in which his certificate of possession is filed, in this case the Court of Common Pleas of Chester County, and that he shall exercise all the rights, powers and duties of the corporation and succeed to its title and right to possession of all property and securities. Article IX of the Code, §§ 901-905, provides for the disposition of the trust funds and mortgage pools of a trust company taken over by the Secretary. After he has filed a notice of his intention to proceed with its liquidation, any certificate holder of a mortgage pool is authorized to apply to the court for the appointment of a substituted fiduciary of the pool. The Secretary is required, "as soon as it may be convenient," to file in court an account of the securities in any mortgage pool conducted by the trust company, and he is directed to apply for the appointment of a substituted fiduciary of the mortgage pool if, within thirty days after the filing of the account, no certificate holder has made such an application. The Code thus provides for the Secretary's possession and administration of the mortgage pools of a closed bank until such time as a substituted fiduciary is appointed.

The bills of complaint in the present suits, naming the Secretary as defendant, were respectively filed in the district court on August 25th and August 28th, 1933, approximately a month and three weeks after the mortgage pool provisions of the Banking Code had become effective. There is no material difference between the two bills of complaint. The plaintiff in No. 549, respondent here, a citizen of Connecticut, is alleged to be the owner of a participation certificate in the larger of the two pools, and the plaintiff in No. 550, respondent here, a citizen of New Jersey, is alleged to be the owner of a participation certificate in the smaller. Each bill, after stating the facts already detailed with respect to the Secretary's possession of the property of the trust company, including the mortgage pools, alleged that the plaintiff had received no interest or income on his

participation certificate after the Secretary had taken possession; that the Secretary had filed no account of the mortgage pools; and avers, on information and belief, "that interest on many of the mortgages comprising said pool has not been paid . . . . and that little effort is made to secure the collection of the interest. . . ." It is also alleged that "there is danger of sales by the respective authorities by reason of the non-payment of taxes on said properties and that little effort is being made to compel the payment of taxes. . . . ." The bills contain no charge of improper conduct, neglect or mismanagement, or any allegation that the failure of the mortgagors to pay interest and taxes was due to want of diligence on the part of the Secretary. They pray the appointment of a receiver to take charge of, conserve and administer all the assets comprising the mortgage pools, but they do not ask the appointment of a new trustee or the removal of the Secretary, or pray any directions or instructions to him, or any other relief except the usual injunction in aid of the receivership.

On the day the bill of complaint in the second suit was filed, attorneys for the plaintiffs filed motions for the appointment of receivers. Two days later, on August 30, 1933, upon telephone notice to the petitioners of an hour and a half, the district judge heard the motions and appointed receivers. The Secretary failed to surrender the mortgage pools to the receivers and the district court issued, on September 2, 1933, a rule to show cause why the Secretary should not be adjudged in contempt. On September 4th, the Court of Common Pleas of Chester County, upon application by a mortgage pool certificate holder, issued an injunction restraining the Secretary from relinquishing possession of the mortgage pool assets until further order of the court. On September 5th, the petitioner filed answers to the petitions to punish for contempt, and made motions, on affidavits and petitions, to dismiss the bills and to vacate the appointment of the receivers. Both motions assailed the bills as not stating facts to show that damage would be suffered by any party in interest if receivers were not appointed. The motions to dismiss also challenged the "authority" of the district court to appoint receivers. In the petitions to vacate the orders appointing receivers, it was alleged that since the closing of the trust company the Secretary had continued to operate the mortgage pools and was ready to file with the Court of Common

Pleas his account of assets comprising the pools, that his management of them was in accordance with the Pennsylvania statutes, and that he had conducted the mortgage pools "with the utmost regard for the interests of the participants." No action appears to have been taken upon the motion to adjudge the petitioners in contempt, but in denying, upon the pleadings and motion papers, the motions to dismiss and to vacate the orders appointing receivers, the district court ruled that it had jurisdiction of the cause as a federal court, and found that nothing had been done by the Banking Department "to provide the means for an active, intelligent, responsible administration of its pools."

The Court of Appeals ruled that the district court had jurisdiction, since the Secretary, in taking possession of the mortgage pools, had acted by authority of the statute and not under any order or decree of the state court. The assets, it was said, were not in the actual or constructive possession of the state court, and consequently there was no occasion to apply the rule of comity under which a federal court will relinquish its jurisdiction in favor of a state court which has first acquired possession of the property which is the subject of suit. See *Penn Casualty Co.* v. *Pennsylvania, supra.* Upon the basis of the finding of the district court that the Banking Department had failed to provide suitable means for the administration of the pools, it concluded that no abuse of discretion in the appointment of receivers had been shown.

From what this Court has recently said in *Pennsylvania* v. *Williams, supra,* it is evident that the district court correctly determined that it had jurisdiction of the cause. The requisite diversity of citizenship and the jurisdictional amount in controversy are shown by the record and are unchallenged. The relief prayed was that which a court of equity is competent to give. The bills of complaint were therefore sufficient to invoke the power and authority conferred on the district court, by the Constitution and statutes of the United States, to entertain the suit and render an appropriate decree.

Since the court had power to act, it is necessary to consider the various objections urged to the decree only insofar as they are addressed to the propriety of its action as a court of equity. These objections were not foreclosed by the determination that the court had jurisdiction. By the Judiciary Act of 1789, c. 20, § 11, 1 Stat.

73, 78; U. S. C., Tit. 28, § 41 (1), the lower federal courts were given original jurisdiction "of suits . . . in equity," where the other jurisdictional requisites are satisfied. From the beginning, the phrase "suits in equity" has been understood to refer to suits in which relief is sought according to the principles applied by the English court of chancery before 1789, as they have been developed in the federal courts.[1] *Robinson* v. *Campbell*, 3 Wheat. 212, 221-223; *United States* v. *Howland*, 4 Wheat. 108, 115; *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, 43. When the petitioners challenged the sufficiency of the bills of complaint and the appropriateness of the appointment of receivers, it was not enough for the district court to decide that as a federal court it had power to act. It should also have determined whether, in accordance with the accepted principles of equity, any state of facts was presented to it which called for the exercise of its extraordinary powers as a court of equity. See *Pennsylvania* v. *Williams, supra.*

The sole relief prayed by the bills was the appointment of receivers and the command of the court that property, shown to be in the lawful possession of the petitioner acting as a temporary trustee or fiduciary, be surrendered to them. A receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. It is not an end in itself. Where a final decree involving the disposition of property is appropriately asked, the court in its discretion may appoint a receiver to preserve and protect the property pending its final disposition. For that purpose, the court may appoint a receiver of mortgaged property to protect and conserve it pending foreclosure, *Wallace* v. *Loomis*, 97 U. S. 146, 162; *Union Trust Co.* v. *Illinois Midland Ry. Co.*, 117 U. S. 434, 455; *Hitz* v. *Jenks*, 123 U. S. 297, 306; *Freedman's Saving & Trust Co.* v. *Shepherd*, 127 U. S. 494, 500-504; *Shepherd* v. *Pepper*, 133 U. S. 626, 652, of trust property pending the appointment of a new trustee. *Underground Electric*

[1] The Act of May 8, 1792, c. 36, § 2, 1 Stat. 275, 276; U. S. C., Tit. 28, § 723, further provided "That . . . the forms and modes of proceeding in suits . . . shall be . . . in those of equity . . . according to the principles, rules and usages which belong to courts of equity . . . as contradistinguished from courts of common law. . . ." See Robinson v. Campbell, 3 Wheat. 212, 221, 222.

Rys. Co. v. *Owsley*, 176 Fed. 26 (C. C. A. 2nd); *Ball* v. *Tompkins*, 41 Fed. 486, 489 (C. C.); cf. *Haines* v. *Carpenter*, 1 Woods 262, aff'd 91 U. S. 254, or of property which a judgment creditor seeks to have applied to the satisfaction of his judgment, *Covington Drawbridge Co.* v. *Shepherd*, 21 How. 112, 125; *Ogilvie* v. *Knox Insurance Co.*, 22 How. 380, 392; *Ingle* v. *Jones*, 9 Wall. 486, 498.

But there is no occasion for a court of equity to appoint a receiver of property of which it is asked to make no further disposition. The English chancery court from the beginning declined to exercise its jurisdiction for that purpose. *Anonymous*, 1 Atkyns 489, 578; *Ex parte Whitfield*, 2 Atkyns 315; *Goodman* v. *Whitcomb*, 1 Jacob & Walker 589, 592; *Robinson* v. *Hadley*, 11 Beavan 614; *Roberts* v. *Eberhardt*, Kay 148, 160, 161.[2] It is true that the receivership of an insolvent corporation, upon the application of a simple contract creditor with the consent of the corporation, has been recognized by the federal courts as an appropriate form of relief when the end sought is the liquidation of the assets and their equitable distribution among the creditors. *Brown* v. *Lake Superior Iron Co.*, 134 U. S. 300; *Re Metropolitan Railway Receivership*, 208 U. S. 90, 109, 110; *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 500, 501; *United States* v. *Butterworth-Judson Corp.*, 269 U. S. 504, 513, 514; compare *Harkin* v. *Brundage*, 276 U. S. 36, 52; *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334, 345; *Shapiro* v. *Wilgus*, 287 U. S. 348, 356; *National Surety Co.* v. *Coriell*, 289 U. S. 426, 436; *First National Bank* v. *Flershem*, 290 U. S. 504, 525. Whether this exercise of jurisdiction, to liquidate or conserve the assets of a corporation through the agency of a receivership, is to be supported as an extension of that exercised over decedents' estates, see Glenn on Liquidation, §§ 154-161, or of remedies afforded to judgment creditors where legal remedies are inadequate, see *Manhattan Rubber Mfg. Co.* v. *Lucey Mfg. Co.*, 5 F. (2d) 39, 42.

[2]The jurisdiction of the English court of chancery to appoint a receiver for the estates of infants, even though no other relief be asked, is a statutory development since 1789. 4 and 5 Wm. IV, c. 78, § 7. The appointment of a receiver for the estate of a lunatic is a non-judicial duty performed for the Crown pursuant to statute. 17 Edw. II, c. 9, 10; see Sheldon v. Fortescue, 3 Peere Williams 104, n. 108. Further provisions for appointment of receivers by interlocutory decree, whenever "just or convenient," were included in the Judicature Act, 1873, 36 & 37 Victoria, c. 66, § 25 (8).

(C. C. A. 2nd),[3] it has never been extended to other classes of cases. Whenever the attempt thus to extend it, by using the receivership as an end instead of a means, has been brought to the attention of this Court, it has pointed out that a federal court of equity will not appoint a receiver where the appointment is not ancillary to some form of final relief which is appropriate for equity to give. *Pusey & Jones* v. *Hanssen, supra,* 497; *Booth* v. *Clark,* 17 How. 322, 331; see *Lyon Bonding & Surety Co.* v. *Karatz,* 262 U. S. 77; *Hollins* v. *Brierfield Coal & Iron Co.,* 150 U. S. 371.

Respondents' bills of complaint not only failed to seek any remedy other than the appointment of receivers, but they failed to disclose any basis for equitable relief by the appointment of receivers or otherwise. Respondents are not shown to be creditors, much less judgment creditors. As beneficiaries of the fiduciary relationship of the trust company, and later of the Secretary, to the mortgage pools, they failed to allege misconduct or neglect on which any equitable relief could be predicated. They did not show that there was any danger to the assets of the mortgage pools, or to their management, which would be avoided or removed by the appointment of receivers. Petitioner did not waive these defects of the bills, or consent to the appointment of receivers.

We have recently had occasion to point out that a federal court, even in the exercise of an equity jurisdiction not otherwise inappropriate, should not appoint a receiver to displace the possession of a state officer lawfully administering property for the benefit of interested parties, except where it appears that the procedure afforded by state law is inadequate or that it will not be diligently and honestly followed. *Gordon* v. *Ominsky, supra; Pennsylvania* v. *Williams, supra.* Even when the bill of complaint states a cause of action in equity, the summary remedy by receivership, with the attendant burdensome expense, should be resorted to only on a plain showing of some threatened loss or injury to the property, which the receivership would avoid. Here no such showing was made. It is true the district court found that nothing had been done by the Banking Department to provide the means for an active, intelligent and responsible administration of the mortgage pools.

[3]See also the authorities collected and discussed in Kroeger, The Jurisdiction of Courts of Equity to Administer Insolvents' Estates, 9 St. Louis Law Rev., 87, 179.

The Court of Appeals, on the basis of this finding, thought there had been no abuse of discretion. But that finding is without support in the record.

The court below erred in not directing dismissal of the bills of complaint as failing to state a cause of action in equity. The appointment of receivers, in the circumstances, was an abuse of discretion which should have been promptly set aside on the applications of the petitioner. The decrees below will be reversed and the cause remanded with directions to the district court to dismiss the bills and discharge the receivers.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.